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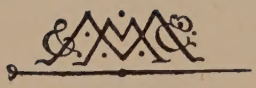
THE SOVEREIGNTY
OF THE
BRITISH DOMINIONS



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THE SOVEREIGNTY
OF THE
BRITISH DOMINIONS

BY

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OF THE INNER TEMPLE, BARRISTER-AT-LAW, AND OF THE SCOTTISH BAR; REGIUS PROFESSOR OF SANSKRIT AND COMPARATIVE PHILOLOGY AND LECTURER ON THE CONSTITUTION OF THE BRITISH EMPIRE AT THE UNIVERSITY OF EDINBURGH; FORMERLY ASSISTANT SECRETARY TO THE IMPERIAL CONFERENCE

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TO MY WIFE

PREFACE

Few constitutional pronouncements have received such varied interpretations by public opinion as has fallen to the lot of the Report of the Imperial Conference of 1926 on Inter-Imperial Relations. It has been regarded as a mere authoritative statement of existing facts regarding the Imperial Constitution; it has been extolled as creating for the Dominions a status of sovereign independence which renders secession needless, since there is no bond to sever; and it has been censured for tending to weaken the efficacy of the British Empire as an instrumentality in assuring the peace of the world.

The Report, in fact, is at once a summary of past achievement and a programme for the future. It can be understood only in the light of the history of the development of the sovereign authority of the Dominions, both in internal and in external affairs, prior to the Conference, and of the steps which have been taken in the United Kingdom and the Dominions to translate into practice the sanction for further development which it accorded. It is, therefore, the aim of this book to consider, without undue detail or technicality, the growth of the sovereignty of the Dominions and its present extent, as well as the limitations to which it is

subject. There is much, it will be seen, that remains obscure in Imperial relations, and it is hoped that a useful purpose may be served by directing attention to some of the outstanding problems still to be solved by the Governments and peoples of the Empire.

There are two fundamental facts regarding the Report which are constantly ignored, and to which, therefore, special attention should here be drawn. In the first place, it has not been approved by any Parliament in the Empire save that of the Union of South Africa; secondly, it has never been communicated to foreign Governments as a declaration of the British view of the Constitution of the Empire. Its authors were well aware that much must be done to clarify the position before final pronouncements either on constitutional or international status will be possible.

It remains to record those events which have transpired or been made public since this book was completed on March 31. The return to office of a Labour Government has brought into immediate importance the issues of a renewal of diplomatic relations with the U.S.S.R., and the acceptance of the clause of the Statute of the Permanent Court of International Justice providing for the compulsory reference to the Court of certain claims. In both cases full assurances of consultation with the Dominions have been given, though no promise has been made that action would only be taken by the Empire as a whole. It is true that action in either matter might be taken for certain parts alone, but there are very strong arguments for unity. There should be excepted from reference to jurisdiction

prize law, immigration questions as desired by the Commonwealth and New Zealand, and inter-imperial issues. It is true that under the terms of the Report of 1926 the latter class of matters would in any event not be within the cognisance of the Court, but a specific declaration can do no harm and will emphasise the British position, that the relations of the parts of the Empire *inter se* are not regulated by the League Covenant nor by international law. It is satisfactory that in explaining the treaty for the renunciation of war the Minister of External Affairs of the Irish Free State declined to claim that the treaty applied between the United Kingdom and the State, and merely asserted that it was clear from the treaty of 1921, the Conference of 1926, and the spirit of the treaty of 1928, that the United Kingdom had renounced war as an instrument of national policy towards the State.

The Dominions have also been consulted on the new terms offered to Egypt. How difficult it is for the Commonwealth to approve British policy in this regard is shown by Mr. Hughes' recent criticism of the grant of independence in 1922, and the representations now made by Mr. Bruce. It is clearly as difficult for the statesmen of Australia to realise those considerations of European polity which condemn any effort to govern Egypt, as for British politicians to appreciate the intensity of feeling in Australia as regards any menace to the security of the Suez Canal route. The terms offered seem, fortunately, honourable and profitable to both Powers. Egypt is offered a status closely approximating to that of the Dominions; an alliance, expressed during

peace by harmony in foreign policy, and during war by co-operation in arms, and made effective by arrangements to secure that the Egyptian forces shall be so organised and equipped as to render adequate aid to the common cause. The bonds are more formal than in the case of the Dominions, for there is no common allegiance to render forms unnecessary. It is proposed that the treaty should be concluded for the United Kingdom and not for the Dominions, as desired in the case of the former proposal by Canada. It must, however, be pointed out that, even if this course is adhered to, the Dominions will be affected vitally by the treaty. If under its terms the United Kingdom goes to war (in circumstances permitted by the League Covenant and the Kellogg Pact), the Dominions will be automatically implicated, and in any case Dominion British subjects will lose the protection of British Consular Courts when other British subjects do. It, therefore, seems unfortunate that in a matter of this kind, vitally affecting Imperial defence and Dominion interests, unity of action should not be arranged, for this is precisely the sort of case in which the Report of the Conference of 1926 contemplated such united action, and the Dominions have not the excuse, as in the case of the Locarno Pact, that they disinterest themselves in European issues.

The principle that the United Kingdom must still dominate foreign policy, despite the duty of consultation with the Dominions, is further illustrated by the fact that naval disarmament will fall to be decided virtually by the success which the Prime Minister can

achieve in negotiations with the United States Government, and that, despite provision for Dominion representation in connexion with the Reparations Conference at the Hague, it devolved on Mr. Snowden to support the rights of the Empire. Room for British experts only could be found on the Young Committee, though it was proposed that, if the British share of reparations were reduced, the loss would not be shared by the Dominions. So again the decision to secure the retirement of Lord Lloyd from the High Commissionership in Egypt was taken, as stated by Lord Passfield on July 25, without consultation with the Dominions on the score of urgency. The task of planning out some more effective means of concerted action has still to be undertaken; the Dominions doubtless do not yet feel inclined to take up seriously the general control of foreign policy.

In special cases Dominion interests have led to the development of diplomatic representation. The Irish Free State has hastened to establish, with Imperial assent, relations with the Vatican State, and M. Briand, in accepting the proposal to establish an Irish legation at Paris, has expressed the conviction that the exchange of Ministers between Paris and Dublin will improve not merely Franco-Irish relations, but also relations between France and the British Commonwealth of Nations, thus emphasising the Imperial aspect of the arrangement which was negotiated through the Paris Embassy. In the Union it was announced on July 24 that provision would be made for Ministers at the Hague, with which the Union has racial ties, Washington, and Rome, for commercial

secretaries at the Hague, New York, and Milan, and a commercial representative at Hamburg. A Consul-General will also be sent to Lourenço Marques. This is the first effective proposal for Dominion Consular services; in the Free State the Minister of External Affairs, on December 16, 1926, intimated that it was proposed to establish consular officers abroad, in order to use them and foreign Consuls in the Free State for minor diplomatic business, but this project did not then mature, and discussions between Canada and the United States in 1927 led to no immediate result. Considerations of cost and of the difficulty of conferring legal powers may delay action.

The objections to Dominion diplomatic representation have been forcibly put by Mr. Hughes, whose thesis is to assert the widest powers for the Dominions but to point out that the exercise of full sovereign authority by each part may destroy the unity which is still desired. This is just and forcible in principle, but in cases where there are special Dominion interests special representation may be justified, as in the case of the Canadian Minister at Washington. It is all to the good that Canada has had, in close consultation with the British Government, the conduct of the negotiations regarding the case of the *I'm Alone*, and has insisted on the acceptance by the United States of her representative as Commissioner under the treaty of 1924. Should the result of the arbitration of the issue prove unsatisfactory, the Dominion may desire the denunciation of the treaty which was concluded by the British Government for the whole of the Empire, after

the Imperial Conference of 1923 had approved the principle of permitting a certain relaxation of the rule as to territorial jurisdiction; if such a request is made, doubtless the Imperial Government would act on it, despite the resulting loss of facilities for the conveying of liquor on board ships in United States territorial waters.

Where the Dominions have no diplomatic representation, the Imperial Government continues to negotiate treaties which provide advantages for the Dominions, though not formally applicable to them. Thus the treaty with Panama, ratified on April 8, is concluded only for Great Britain, Northern Ireland, all British colonies and protectorates, and all mandated areas administered by the King's Government in Great Britain. But it gives the King power to accede to the treaty for any Dominion or India and to terminate such accession; the Dominions and India are given most-favoured-nation treatment in Panama so long as they concede such treatment to the products or manufactures of Panama, and all British subjects are given valuable privileges, thus negativing the contention that nothing affecting the Dominions can be agreed upon save by their own plenipotentiaries. On the other hand, there is an excellent example of an agreement which is not technically a treaty as defined in the resolution of the Imperial Conference of 1923 in the letters exchanged by the Prime Minister of New Zealand and the Japanese Consul-General on July 24, 1928, now issued by the Foreign Office under the not quite precise style of Treaty Series No. 6, 1929, providing

a *modus vivendi* in commercial matters pending the Dominion's adhesion to the Anglo-Japanese treaties of 1911 and 1925. For purposes of the League Covenant such agreements require registration, just as do conventions negotiated under the Labour Organisation procedure, which are registered and become binding on ratification. But these conventions do not rank as treaties as understood in Imperial Constitutional Law, being concluded and ratified by Dominion authority alone without the issue by the King of full powers or his ratification. The Imperial Conference of 1926 definitely disapproved the extended use of such agreements by laying it down that in the case of conventions negotiated under League auspices (other than Labour Organisation conventions) the full treaty form should be adopted, with the issue of full powers and instruments of ratification. In fact, the conventions of 1927 as to the abolition of import and export restrictions, on arbitration clauses in commercial matters, and to establish an International Relief Union, have been drawn up in the form of treaties between heads of States as desired by the Conference. The advantages of this mode of procedure as compelling inter-imperial consultation are undeniable.

The desire of the Union Government to confer on its representative in London the style of Minister Plenipotentiary, as of more distinguished character than a High Commissioner, must, of course, be read subject to the rule laid down by the Conference of 1926 as inherent in Imperial relations that the rules of international law do not apply between the parts of the

Empire, and no alteration of style can alter the character of the office as a matter of domestic concern, nor confer on its holder diplomatic immunities. The proposal differs essentially from that suggested by the Imperial Government in 1912, which contemplated the presence in London of resident Ministers of the Dominion Cabinets for purposes of continuous consultation as between Governments; the new suggestion is merely an accentuation of the political side of the activities now carried on by the High Commissioners of the Dominions, who, as such, are servants, not members, of Dominion Governments.

The Irish Free State has given further proof of its anxiety to assert independence of the Crown in the shape of the refusal of the Governor-General, on the advice of the Ministry, to attend the Trinity Week Celebrations because the normal tribute of playing the National Anthem in his honour was contemplated. More unfortunate is the action taken in July to reverse in advance any judgment which the Privy Council might give in the appeal of the Performing Right Society Ltd. against the decision of the Supreme Court to the effect that the Copyright Act, 1911, is not in force in the Free State. Senator Sir John Keane denounced the legislation as unwise, wrongful, and damaging to the national prestige, but the Minister of External Affairs insisted that the Government was determined to get rid of the appeal, and that anyone who appealed must do so at his own risk. It is difficult to justify this attitude as long as the appeal forms part of the Constitution and is implied in the treaty of 1921, but it must

be recorded that up to the present the only result of the British insistence on the appeal is that the British Government has been compelled to pass legislation to vary Article 10 of the treaty of 1921 and to undertake liability for payments to Irish Civil Servants, which the Privy Council has declared to be due, but which the Free State repudiates. It may be hoped that the appeal may be formally relinquished in time to prevent further inroads on the pockets of the British taxpayer. The reluctance of the Free State to suffer any limitation on Parliamentary Sovereignty is further attested by the decision to extend for eight years the power to amend the Constitution by simple act; it is legitimate to anticipate that the elaborate safeguards of the Constitution are virtually dead.

General Hertzog's victory in the general election has not merely given a popular imprimatur to his policy of refusing to discriminate between foreign countries and the Empire in matters of trade, but has facilitated the carrying out of the plan to abolish the present native franchise in the Cape. It is clear that the Imperial Government cannot be expected to intervene in this matter, but the definitive adoption of a policy of racial supremacy and European domination, as opposed to the ideal of a civilisation test, must render it extremely difficult to consider the transfer to the Union of Basutoland, the Bechuanaland Protectorate, and Swaziland, which have been governed by Imperial authority in the interests of the native inhabitants. It is impossible to overlook the analogy of the position of these territories to that of the Indian States, and the

Indian States Committee, 1928–9, has expressly recognised that, as the relations of the States are with the Crown, the Indian Princes "should not be transferred without their own agreement to a relationship with a new Government in India responsible to an Indian Legislature". The relations of the native territories in South Africa are direct with the Crown and the Imperial Government, and transfer without their consent to Union administration would be open to grave legal, as well as moral, objection. Further, the extension of Union native policy to South-West Africa undoubtedly strengthens the claims of those German authorities who argue in favour of the retrocession of the territory to Germany, a contention which the trade policy of the Union is doubtless intended to counter.

As not only many continental and American writers but also British authorities have adopted the view, here rejected, that the British Empire has been dissolved in a number of States in a personal union, the King acting on the advice of several sets of Ministers, it is worth while citing the testimony of Mr. Hughes: "The King can do nothing except upon the advice of his ministers. If his ministers in Canada or Australia tender him certain advice, the King must submit that advice to his ministers in London and must accept or reject it as they advise." The position, in fact, is fundamental; the King must not be placed personally in the impossible position of being advised to proclaim war by the Imperial Government, and to issue orders for the observation of neutrality by the Union Government. Such a position would be intolerable for the Sovereign

and his people alike, and those politicians who desire to eliminate the advice of Imperial Ministers will do well if they adopt the solution of transferring to the Governor-General a further measure of Royal authority as regards war and treaties, should they prefer this to the more logical course of seeking independence.

This work deals only with the Dominions technically so styled. Southern Rhodesia and Malta possess responsible government subject to certain limitations of subject matter, but have not yet been accorded Dominion status by the Imperial Conference. Newfoundland is a Dominion and is entitled to diplomatic representation and consultation on the same footing as the greater Dominions, but is not a member of the League of Nations, and normally uses British diplomatic machinery and accepts the Imperial Government's views of foreign relations. India, though a member of the League and assured in due course Dominion status, has not yet attained it.

Imperial terminology is somewhat unsettled. The Foreign Office uses Great Britain freely as an abbreviation for the United Kingdom of Great Britain and Northern Ireland as defined in the Royal and Parliamentary Titles Act, 1927; I have adhered to the term United Kingdom. It is not rare to find the term British Commonwealth of Nations used to denote the United Kingdom and the Dominions (Canada, Australia, New Zealand, the Union of South Africa, the Irish Free State, and Newfoundland), but this has so far no legal sanction, and the term is used in the treaty with the Irish Free State as equivalent to British Empire; the

latter expression has both legal and international recognition and seems to me preferable as a designation for the whole of the territories under the Crown.

My best thanks are due to Messrs. Macmillan & Co. for undertaking the publication of this book, and to Messrs. R. & R. Clark of this City for their care in its production.

A. BERRIEDALE KEITH.

THE UNIVERSITY OF EDINBURGH,
August 10, 1929.

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INTRODUCTION

CHAPTER I

THE IMPERIAL CONFERENCE OF 1926 AND THE PROBLEM OF SOVEREIGNTY

Sovereignty as a political term has of late fallen into some disrepute, and international lawyers have suggested its elimination from their terminology. The revolt, however, rests on inadequate grounds, and is based on the misuse of a word which still can serve important purposes. Sovereignty, it is pointed out, has been applied to the State in the sense that the State claims for itself complete control over the whole life of the individual, and denies the validity of any conflicting loyalty. Now, it is true that, outside Italy under Signor Mussolini's régime, there is little disposition at the present time to admit that the State should be all in all and cover the whole of human activity; but State sovereignty does not necessarily carry with it any such extended connotation, and it is both useful and legitimate to recognise two aspects of such sovereignty, internal and external. At the same time it is necessary to admit that sovereignty can be divided, and that in any country both internal and external sovereignty may be shared by various authorities.

Chapter I.

In a Constitution of the strictly unitary type there is little difficulty in determining in what body internal sovereignty is deposited. In the United Kingdom the supremacy of Parliament is undoubted, and there is a perfectly intelligible and useful sense in which it can be asserted that the United Kingdom has full internal sovereignty.[1] In the case of the British Dominions, in the technical sense of the term (Canada, the Commonwealth of Australia, New Zealand, the Union of South Africa, the Irish Free State, and Newfoundland), the position is not so simple. So long as the Imperial Parliament has supreme authority to legislate for the whole of the Empire, as the Imperial Government has power to prevent Dominion laws becoming operative, and as the Privy Council can admit appeals from Dominion Courts, it is clear that there is some division of sovereignty between the United Kingdom and the Dominions. But it is only of late years that the question of Dominion sovereignty has become a matter of discussion, and this discussion has chiefly arisen with regard to the aspect of sovereignty as external. Until the war of 1914–18 it was practically conceded by all authorities that the Dominions had no external sovereignty whatever, and that the sole external personality in the Empire rested with the Government and Parliament of the United Kingdom. But the peace settlement brought with it developments which clearly gave some measure of external sovereignty to the Dominions, and it is now desirable to seek to determine as exactly as possible the present measure of internal and external sovereignty vested in the Dominions, though the task is one of special complexity.

[1] See A. V. Dicey, *Law of the Constitution* (8th ed.), chap. ii.

It is the distinctive feature of the British character to recognise the danger of the effort to define precisely constitutional relations. The merits of the British Constitution are closely related to its fundamental elasticity, which permits change by peaceful evolution and offers no encouragement to revolutionary attack. The temptation rigidly to define the powers of the Sovereign, though often present during the period of friction between the Crown and Parliament, has been resisted, and the Crown still retains a right of intervention in crises—and thus was enabled to contribute a vital element to the successful negotiations which brought into being the treaty of 1921 with the Irish Free State. It is significant that whenever, for special reasons, a departure has been made from this sound principle, confusion has been the result. Among the many causes which have impeded the successful working of the reformed Constitution given to India by the Government of India Act, 1919, importance attaches, as Sir John Simon has not failed to note, to the rigidity imported by the plan of legal definition, which has hampered the growth of constitutional Conventions and the adaptation of the British system of responsible government to Indian conditions.

Most fortunately for Imperial relations, the temptation to regulate them by formal constitutional law has been resisted. The introduction of responsible government, the step which saved the United Kingdom the loss of a second Empire, was carried out by mere instructions from the Crown, conveyed by despatch; and in the only case where the system has been regulated strictly by law, that of the Irish Free State, nothing but inconvenience—and some measure of risk—has re-

Chapter I.

sulted from the departure from principle. It is indeed possible on paper to establish the merits of Imperial federation, an idea which has fascinated many powerful minds. But the weaknesses of federation have been admirably expounded by the late Professor Dicey,[1] and the prediction that the loose texture of the British Empire would endanger its safety in the event of war, was disproved by the extraordinary strength which was manifested in the war of 1914–18. It was inevitable, therefore, that when the Prime Ministers of the Empire met at the Imperial War Conference of 1917 they should have deemed it their duty "to place on record their view that any readjustment of the constitutional relations of the component parts of the Empire, while thoroughly preserving all existing powers of self-government and complete control of domestic affairs, should be based upon a full recognition of the Dominions as autonomous nations of an Imperial Commonwealth, and of India as an important portion of the same; should recognise the right of the Dominions and India to an adequate voice in foreign policy and in foreign relations; and should provide effective arrangements for continuous consultation in all important matters of common Imperial concern, and for such necessary concerted action, founded on consultation, as the several Governments may determine". The decision was definitive, and though the Prime Ministers then contemplated that an Imperial Conference should be summoned as soon as possible after the cessation of hostilities to carry out a readjustment of relations, they had in effect rendered such action needless. This was frankly recognised by the Imperial Conference of 1921,

[1] *Law of the Constitution* (8th ed.), pp. lxxxiii-xci.

the first to be held after the war, when there was general agreement that the making of a new Imperial Constitution was undesirable, and Mr. Lloyd George in the House of Commons on August 18, 1921, effectively defended the conclusion reached by the Conference.

The decision of 1921, however, was not without critics in the Dominions. Lecturing to the University of Toronto on October 7, 1921, Sir Robert Borden insisted that the Dominions had not yet achieved an adequate voice in foreign policy and in foreign relations;[1] but the advent of a Liberal Government to power in the Dominion was followed by a tendency to fall back on Sir Wilfrid Laurier's preference for an attitude of isolation and detachment from concern with the general current of British foreign policy. The impulse to further definition came from two of the lesser Dominions in the first instance. The Irish Free State had been included among the Dominions only with the greatest reluctance on the part of its political leaders. Mr. Churchill and others have explained the peculiar circumstances under which some of Mr. de Valera's colleagues decided that it was preferable to accept Dominion status rather than continue a struggle in which the British Government would put forth unprecedented efforts, if it could rely on the support of a public convinced by Irish intransigence of the necessity of drastic measures of suppression. But the acceptance, as the debates on the ratification of the treaty in the Irish Legislature showed, was reluctant, and was accompanied by the fixed determination to work unceasingly for the definition of the character of Dominion status in the direction of the maximum

[1] See also his *Canadian Constitutional Studies*, pp. 113-16.

amount of independence. There is no doubt justification for the claim made in the Dail by the Minister for External Affairs on November 21, 1928, that the Free State had been a protagonist in the process of asserting Dominion autonomy; but its efforts would have been of comparatively minor importance had they not been contemporaneous with the desire of the Union of South Africa to achieve a clearer enunciation of the precise status of the Dominions as the outcome of their participation in the Peace Conference of Paris and their admission into the League of Nations.

General Smuts' position, when he returned to the Union after his great services to the Empire as member of the Imperial War Cabinet, was one of much difficulty. The rebellion of 1914–15 had proved how strong was the demand for independence among the Dutch population, and he was confronted with the problem of satisfying the protagonists of the movement for independence that the status acquired as the outcome of the Peace Conference was for all essential purposes the equivalent of formal independence, while it involved also all the advantages of close association with the rest of the British Empire. He was, however, challenged to say that the new status carried with it the right of secession; and while he contended that the Crown had ceased to have the right to refuse to assent to Union Bills in general, he asserted that a Bill to sever the connexion of the Union with the Empire could not legally or constitutionally receive the Royal sanction. He thus negated the essential claim of the Nationalist Party, whose programme included the attainment of full sovereign independence, and in due course his Ministry fell before the combined forces of

the Nationalists and Labour. The coalition, however, was only secured on the formal agreement in 1923 that independence should not be made part of the governmental programme.[1] The strength of the opposition to independence was thus vividly impressed on the mind of General Hertzog as leader of the Nationalist Party and Prime Minister, and doubtless induced the desire to explore the possibilities of securing, within the framework of the Empire, a position for the Union which would remove the issue of independence from its dominating place in the political field, leaving him free to grapple with the ever-pressing problem of the relations of European and native. Hence it was that General Hertzog consented to take part in the Imperial Conference of 1926, and in his opening speech stressed the point which to him was essential: the placing of the Dominions on a footing of absolute equality with the United Kingdom.

The concurrent aims of the Irish Free State and the Union might have been frustrated had they met with the opposition of the older and more important Dominions, and much depended at the Conference on the attitude to be adopted by the Prime Minister of Canada. Mr. Mackenzie King had shown much of the spirit of Sir Wilfrid Laurier; pertinacious in developing the autonomy of the Dominion, he had refrained from any effort to define precisely his view of the relations which should exist between Canada and the United Kingdom. It is not improbable that he would have persisted in this attitude but for the constitutional crisis of 1926,[2] which brought him into some-

[1] See E. A. Walker, *History of South Africa*, pp. 563-9, 593-5.

[2] See Keith, *Journal of Comparative Legislation*, 1926, pp. 275-80.

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what sharp conflict with the Governor-General. The issue then involved was wholly one of internal politics; the Governor-General neither asked nor received any advice from the Imperial Government, nor did any conflict arise between the Dominion and the United Kingdom. But the fact that the Governor-General was in Imperial issues the agent of the British Government undoubtedly caused some confusion in Canada; and Mr. Mackenzie King determined that it was desirable that this position should cease, and that the Governor-General should become simply the constitutional head of the Canadian Government, acting as vicegerent for the King. This decision necessitated his participation in the Imperial Conference, at the cost of great personal pressure; and thus it was that his support was available at a critical moment for the contentions of the spokesmen of the Irish Free State and the Union.

The position of the other Dominions was by no means in exact accord with that of the Free State, the Union, or even Canada. Newfoundland, of course, has now a distinctly inferior status to that of the other Dominions in so far as external affairs are concerned. Her small size and microscopic population have denied her membership as an independent unit of the League of Nations, and it was not to be expected that her Prime Minister should desire to disturb the constitutional relations between her and the mother country. Nor was there any serious dissatisfaction either in the Commonwealth of Australia or in New Zealand with the *status quo*. The war had brought very vividly home to both Dominions the vital importance of sea power, and the absolute necessity, if their national existence was to be preserved, that they should re-

main integral parts of the Empire, acting in the closest communion with the United Kingdom. Their points of view were in some measure different, as accorded with their relative power and potentialities. Australia, as a continent with enormous potentialities, was inclined to emphasise the policy of autonomous co-operation in foreign affairs and defence, while New Zealand was more ready to permit the United Kingdom, which bore the real burden of defence, to determine foreign policy. But neither Dominion felt any strong need for further efforts to define their relations with the rest of the Empire. Constitutional issues of this kind were seldom raised in their Parliaments, and, when mooted, passed over with merely formal discussions—in striking contrast to the vehemence displayed in the Irish Dail or the Union Assembly, or to the more moderate and reasoned but still weighty discussions of issues of status in the Canadian House of Commons. It was, therefore, inevitable that the voices of these Dominions should be raised against any proposal fundamentally to remodel the relations between the parts of the Empire as they had been evolved in recent practice, and the task of reconciling into an agreed presentation views so disparate was one of a most formidable character.

Fortunately for Imperial harmony, it was decided by the Conference to remit the constitutional issue to a Committee of Prime Ministers and heads of Delegations, and to appoint the Earl of Balfour as chairman. The choice was exceptionally fortunate, for the task was essentially one demanding unusual talent in devising formulae which would command general acceptance, but which would also allow each Dominion

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to claim that its special point of view had been given full effect. The profound and subtle intellect of a master of dialectic availed ultimately to secure the adoption of a report which gave satisfaction to the Free State and the Union, without antagonising the very different outlook of the Commonwealth and New Zealand. That such a report must contain ambiguities is obvious: Lord Balfour himself, speaking at Edinburgh, readily admitted that fundamental issues remained unsettled; but this is no reason for condemnation. It was essential to tide over a rather critical moment in Imperial relations by the adoption of a formula which would gratify the demand for recognition of Dominion sovereignty, while at the same time laying stress on the essential element of Imperial co-operation.

The Committee declared that "nothing would be gained by attempting to lay down a Constitution for the British Empire. Its widely scattered parts have very different characteristics, very different histories, and are at very different stages of evolution; while, considered as a whole, it defies classification and bears no real resemblance to any other political organisation which now exists or has ever yet been tried." But it held that there was "one most important element in it which, from a strictly constitutional point of view, has now, as regards all vital matters, reached its full development—we refer to the group of self-governing communities composed of Great Britain and the Dominions. Their position and mutual relation may be readily defined. They are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their

domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations." The negative aspect of this definition was not denied by the Committee, but it insisted, as a corrective of any false impression of mere assertion of autonomy which might be conveyed, that the British Empire did not depend on negations, but rested on positive ideals; free institutions were its life-blood, but free co-operation was its instrument in securing peace, progress, and security, among other objects. Each Dominion was now master of its destiny; in fact, if not always in form, it was subject to no compulsion whatever; it was, and must remain, the sole judge of the nature and extent of its co-operation, but no common cause would thereby be imperilled.

Had the Committee gone no further, the report might have been justly criticised as lacking to a certain extent in reality. The Irish Free State, the Union, New Zealand, as equals of the United Kingdom present difficulties to common-sense opinion, and the Committee, therefore, added a rider of the utmost importance, which has far too often been forgotten when summarising the results of the Conference. "Equality of status," it was added, "so far as Britain and the Dominions are concerned, is thus the root principle governing our inter-Imperial relations. But the principles of equality and similarity appropriate to status do not universally extend to function. Here we require something more than immutable dogmas. For example, to deal with questions of diplomacy and questions of defence, we require also flexible machinery—machinery which can from time to time be adapted to the changing

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circumstances of the world." The rest of the report, in its recommendations, is based consistently on the view thus effectively expressed. It represents a persistent, and not unsatisfactory, effort to escape from the negativism of insistence on equality between the parts of the Empire to the development of the essential element of co-operation which makes the Empire a reality. It is natural enough that foreign opinion in special, and opinion in some of the Dominions, should have been interested rather in the declaration of the character of Dominion status than in the substantive recommendations of the Committee. But the emphasis of the report is quite clearly laid, not on distinct sovereignty, but on that unity of interest and aims which is of infinitely more importance than theoretic definitions.

The reception accorded to the report in the United Kingdom and the Dominions other than the Union of South Africa was somewhat reserved.[1] The ambiguities of the report were fully realised, and, while there was no desire to underrate the difficulties of the task set the Committee, there was some doubt as to the value of the solution achieved. One reason for this was that dwelt on by Lord Parmoor in the House of Lords on December 8, 1926, when he criticised the procedure adopted. The Committee had, naturally, followed up its attempt to define the relations of the Dominions to the United Kingdom by an effort to recommend the removal of all legal restrictions on Dominion autonomy which were inconsistent with its views; but it had proved impracticable to secure any definite result on the most vital issues, the re-

[1] See *The Round Table*, xvii. 225-38, 353-9, 426-9, 600-6, 609-15.

servation or disallowance of Dominion Acts, the territorial limitation of Dominion legislation, and the supremacy of Imperial Acts, including the Colonial Laws Validity Act, 1865. It had, therefore, determined to refer all these issues, with which it had failed to deal finally, to consideration by a Committee; and Lord Parmoor pointed out, with some force, that it would as a matter of procedure have been the wiser course to have referred the issues to a Committee in the first instance, and only after its report had been received to have determined on a definition of status, which, so long as these issues were unsolved, could not be regarded as exact. To this contention there was but one reply, that suggested by Lord Balfour: that practical convenience demanded that the wishes of the Dominions should be met by a general declaration, leaving the problems of detail to be dealt with later. In the House of Commons it was not until June 2, 1927, that a brief discussion of Imperial affairs took place, on the motion for the adjournment of the House for the Whitsunday recess; and a fuller discussion was delayed until June 29, when the topic, among others, was dealt with on the vote for the Dominions Office. No effort was made by the Government to obtain the approval of the report by the House of Commons, but Sir John Marriott bluntly asked whether there had been effected a change in constitutional relations within the Empire by the Conference, and, if so, on what legal basis it rested, and what authority had been obtained from Parliament for the change. The Secretary of State for the Dominions adroitly parried the attack by insisting that the Conference had declared existing rights, and had not created new rights; the

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position asserted had long existed in practice, and all that was new was that it was now definitely set out in clear terms. He was careful to insist that equality of status did not necessarily imply equality of stature, and he did not contemplate that developments in practice would be based on equality of status being pushed to its logical conclusions. The principle of equality was not in the least infringed because one Government rather than another dealt with questions affecting all. What was meant by equality of status was that, so far as the question of rights was concerned, every Government of the Empire was, if it so wished, entitled to exercise every function of national and international right. But he hastened to correct any suggestion of the probability of independent action by insisting that "the essential unity of the Empire had never been more strongly emphasised than it was at the late Conference, or felt to have been strengthened as it was by men of very different views who assembled at that Conference. That measure of unity was embodied in the symbol of a common Crown, a Crown common to the whole Empire, one and indivisible, constituting them all one common body of British subjects, embracing Governments unfettered and free in their action, all morally bound by the fact that they were Governments of the same Crown, responsible to the Legislatures in which the same Crown was a constituent element, responsible to an electorate composed of subjects of the Crown, and, as such, loyal to the Crown and each other." It would doubtless be unwise to seek too much precision in these views, and the House of Commons doubtless felt that what was essential was the Minister's conviction that the

spirit which animated the Conference was a sense of the importance of Imperial unity and Imperial co-operation.

In Canada, likewise, no formal motion of approval of the report was brought forward by Ministers, though it seems that this procedure was originally mooted. Mr. Mackenzie King, however, defended successfully his final decision by pointing out that the report of the Imperial Conference of 1923 had, in like manner, not been submitted to the approval of Parliament, and that it was undesirable to treat the matter as controversial. The declaration as to status had served the important purpose of allaying discontent in the Irish Free State and in the Union; and if action were requisite on any definite point, the approval of Parliament would be sought, which was a mode of procedure preferable to asking general approval for a complex report. The Opposition suspected that the report might in some way affect the Constitution of Canada and endanger the security of the Provinces; but on a strict party vote a resolution urging that no change should be made in the British North America Act, 1867, affecting the Provinces, without their consent, was negatived, though it was made clear by the Government that it did not contemplate any such possibility. Mr. Bourassa, on March 29, 1927, with his wonted directness, insisted that there was a fundamental contradiction between the conception of Canada as remaining within the Empire and being at the same time a fully sovereign independent nation. An acid test was afforded by the issue of neutrality; to declare neutrality was an inherent prerogative of an independent State, but Canada could not do so and remain a member of the Empire. No

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answer to this assertion was attempted by the Government, which was reticent as to the scope and effect of the resolutions of the Conference, while the Opposition deprecated any interference with the established relations between the Dominion and the United Kingdom.

Still less disposition was shown in the Commonwealth of Australia to treat the Conference report as an epoch-making document. Mr. Hughes, on March 22, 1927, analysed it with equal accuracy and brilliance, reducing its assertions to their true character. The essential principle of the Empire was, he recognised, "perfect autonomy of the parts and unity of the whole", but these two principles were so violently opposed that they could not be reconciled if either were pushed to the extreme: "We may do as we wish only if we do not by our act impair the unity of the Empire. This unity is vital for Australia. . . . I am for the Empire, because I know of no other way of being for Australia." The question whether the Conference resolution recognised the right of secession, he met by asserting that in practice some Dominions might secede, while others might not, because the right of secession, if it endangered the safety of another part of the Empire, might be met by the primary right of that part to defend itself—doubtless an allusion to the position of the Irish Free State. The Prime Ministers of the Empire were equal in status, but not in stature; they were entitled to advise the Crown on all matters in which they were interested, but the King must act on the advice of that Ministry which supplied the forces upon which the existence of the monarchy and the safety of the Empire depended. Characteristically, he emphasised

the impossibility of Australia adopting an attitude of isolation or seeking to confine her interests within local limits; while the Prime Minister, Mr. Bruce, adopted a similar point of view in insisting, as he had done while travelling home via Canada, that it was incumbent on all parts of the Empire to play a part in the common defence.

In New Zealand, as in the Commonwealth, the report of the Conference formed the subject of some desultory remarks, but no effort was made to ask the approval of the Parliament for its terms. The discussion revealed the strength of the view shared by the chief spokesmen of the Government in favour of the maintenance of the closest contact with the United Kingdom and of the policy of leaving to the British Government the effective control of foreign affairs, subject to the condition that in all matters specially affecting the Dominion the views of its Government should receive the fullest consideration and so far as practicable be carried into effect. Sir James Allen, who had long been High Commissioner for the Dominion in London, stood almost alone in favouring the taking by the Dominion of a more active interest in the issue of the general conduct of foreign policy. The domestic issues affecting development inevitably render the Administration, whatever its political complexion, little disposed to concern itself with the larger issues of external affairs. To Newfoundland also the report brought no special satisfaction, nor was it approved by the Parliament. Instead, the Prime Minister candidly stated, on May 11, 1927, that the Government had not asked for, nor did they wish, a status of equality with the mother country; it was of no value to them, and the net outcome might

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be that if at any time they might have a difficulty in governing themselves and apply to the King for a Royal Commission, they might receive the answer, "Physician, heal thyself."

The attitude of the Irish Free State towards the report was one of restrained satisfaction, and even here no effort was made to secure the approval of Parliament for its terms. Mr. Fitzgerald, Minister for External Affairs, was conscious of some need to defend the position of acceptance of Imperial co-operation which his Government had adopted at the Conference, and he stressed the fact that, despite membership of the League of Nations, under existing conditions, it was definitely essential in the interests of the Free State that it should be affiliated to a great group of States such as the British Empire had now become. He stressed also the doctrine of co-equality as asserted by the Conference, and assured the Dail that it was merely a question of time for the disappearance of the remaining traces of the superiority of the United Kingdom. The leader of the Opposition, on the other hand, held that the Free State had suffered from accepting a similar position to that of New Zealand. The Free State had entered the League not as a self-governing Dominion but as a self-governing State; it had never admitted that it was in an inferior position to the United Kingdom, and no satisfaction could be derived from a statement of an equality which had always existed. The effect of the report, in his view, was rather to assert that the Dominions were part of the British Empire as an international unit, and were bound to unity of foreign and defence policy. The report would thus retard political development in Ireland, would place obstacles

in the way of the maintenance and improvement of relations with Great Britain, and would exercise a disintegrating effect on the League of Nations. Professor Magennis was still more outspoken in his denunciation of the report. It marked a definite retrogression in the status of the Free State, and he declared that the Imperial Conference was in reality a super-Cabinet, contriving by various intrigues, arrangements, and agreements to transform the real character of the status of the components of the British Commonwealth without leaving proper room for full examination by Parliament.

General Hertzog returned to the Union bearing with him as a triumph of his diplomacy the declaration of equality of status, and the Nationalist Party readily accepted the cue to insist on the complete change which had been introduced into the conception of the Empire as a result of his initiative. The suggestion implied was that General Smuts had been guilty of favouring a totally false view of the Empire as a super-State with power to dictate the policy of the Dominions, and that General Hertzog had succeeded in securing the condemnation of this suggestion. General Smuts, however, had the legitimate satisfaction of seeing his opponent adopt expressly the doctrine that the idea of achieving independence was now no longer to be included in the Nationalist Party programme, on the score that the Conference had conceded the fullest sovereign status and independence. Curiously enough, despite this view of the Prime Minister's, he failed to take the obvious course of immediately asking Parliament to homologate the report of the Conference, and it was not until after a pro-

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longed delay that, in March 1928, the definite step was taken of moving that the House of Assembly should approve the report. The discussion revealed the gulf between the opinions of the Prime Minister and General Smuts. The former contended that the report was an epoch-making document, which conceded to the Union the rank of a completely sovereign State, though he candidly admitted that the term independence had not been used in the report, in order to avoid any possibility of misunderstandings. He himself had no doubt of the real sense of the Conference definition of Dominion status; it implied—though here again admittedly the Conference had not arrived at this result—the right of each Dominion to remain neutral in a war in which the United Kingdom might be engaged. The gravity of this declaration was mitigated by insistence on the fact that a contingency of this kind was most unlikely to arise. General Smuts, however, while welcoming the declaration as placing the true status of the Dominions in a clear light, insisted that there was involved no vital change in the Constitution of the Empire. There remained still many obscurities in the position, which the wise framers of the report had left for future adjustment. But he differed definitely and completely from the view of General Hertzog that the possibility of neutrality in a British war had been created by the Conference. He made it clear, therefore, that, while his supporters would join the Government in unanimous acceptance of the report of the Conference, that action did not imply any acceptance of the Prime Minister's exposition of the import of that document. Nor did the Prime Minister, in face of this declaration, attempt to amend the motion of

approval of the Conference report so as to secure the formal acceptance by the House of his own interpretation.

It is clear from this summary of Dominion opinion that the report evoked in the Dominions hardly less uncertainty of its precise signification than was its fate in the United Kingdom. On the whole, there is no doubt that the general impression coincided with that of General Smuts; it was felt that the Conference had served rather to place in a clear light existing relations than to alter vitally the Constitution of the Empire.[1] That the latter view is sound is sufficiently proved by the striking fact that in the Union Parliament alone was the formal step taken of asking for a vote of approval of the report. Had any constitutional change of consequence been planned by the framers of the report, the immediate sequel would have been the formal request by each Government for the approval of its Parliament, for nothing could be more contrary to the essential foundation of the Imperial Conference than to suggest that it has any powers beyond those of recommendation. The effect of a resolution has from the first been dependent on the steps taken to carry it into effect by the Governments of the Empire; and by their inaction those Governments signified unmistakably their view that the report was declaratory of a status already achieved, and not creative of a new Imperial Constitution. This is not in any degree to minimise the importance of such a declaration. Nothing in it was new, in the sense that all it asserted had been formally stated by Prime Ministers of the United

[1] This view is emphatically expressed by Sir Robert Borden (*Canada in the Commonwealth*, p. 125).

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Kingdom and Secretaries of State. But these declarations acquired a new weight and significance for the world by their formal homologation by the conclave of Prime Ministers of the Empire, and in that sense the Conference may be regarded as an event of first-rate importance. It is, however, impossible to take the view of Sir John Marriott that the report is in any way comparable in importance with Lord Durham's famous report on the Canadian question of 1839. The latter definitely presented for the first time in practicable form the scheme of responsible government which was to prove the salvation of the Empire; the former is not directly creative, but it sums up the outcome of a long and complex development, recognises clearly its tendency, and expresses approval of the maintenance of the trend of events. Nor in any evaluation of the work of Lord Balfour and his colleagues can there be forgotten the real value of the report in enabling the Governments of the Irish Free State and of the Union of South Africa to make head against those elements in either Dominion which were pressing for the adoption by their Governments of the doctrine of absolute independence, and the cessation of membership of the British Empire.

As the Conference of 1926 did not define with any precision the extent of sovereignty, internal or external, of the Dominions, it remains to gather an answer to our enquiry from the history of the relations of the Dominions to the United Kingdom both before and after the Conference. Its position can be effectively understood only in the light of past events and of the action which has been taken in the several parts of the Empire to carry further the principles which it

enunciated. It appears that its authors contemplated much more rapid action towards the investigation of the implications of their report than has proved possible. The definite issues of the limits of the legislative power of the Dominions which they desired to have dealt with by a Committee have proved harder of adjustment than had been anticipated, and action in these matters must await final adjustment by the next Imperial Conference, to assemble after provisional agreement has been achieved by expert examination. But reflection shows that this result was inevitable. It is easy enough to enunciate general principles, but the practical adjustment of details in such a manner as to permit of legislative effect being given to them is extremely hard, and there is still in many quarters a strong feeling of reluctance towards any attempt to reverse the long-established British practice of permitting Imperial relations to be regulated by constitutional understandings in lieu of formal law. Nor can it be doubted that there is much to be said for the opinion which asserts that the needs of the Dominions can sufficiently be met by declarations of constitutional Conventions in lieu of attempting the creation of a system of legislative recognition of Dominion sovereignty. But in certain points, at least, it is plain that legislation is essential to give effect to desires of the Dominions which are admittedly valid.

The view taken above of the nature of the resolutions of an Imperial Conference stands, of course, in sharp contrast with that suggested by a distinguished exponent of the views current in South Africa,[1] who

[1] M. Nathan, *Empire Government*, p. 80.

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holds that the report constitutes a Convention binding between the different portions of the Empire, just as a treaty is binding between foreign States. A treaty, he admits, often requires legislative sanction, but once ratifications have been exchanged, each of the contracting parties is entitled to regard it as binding and operative. In the case of a general agreement between representatives of Great Britain and the Dominions at an Imperial Conference, it is contended that "no such formalities are necessary; the practice has been to regard the assent of the representatives as sufficient, the assumption being that they bind their respective Governments and undertake to see that the necessary legislation is passed, or the requisite adaptations and modifications made in the constitutional machinery". It is clear that if this dictum were accepted, there would be an end to agreements on any point of importance at Imperial Conferences. The idea that the Prime Minister of a Dominion can go to London and agree in a secret meeting to resolutions which then become binding on the Dominion would destroy all possibility of the maintenance of the system of Conference. As the Governments of the Empire conclusively pointed out in unison,[1] when in 1924 the Imperial Government suggested possible means of improving the effectiveness of the Conferences, the essential principle is, and must be, that each Parliament is the final judge of what is acceptable. Just as in the Dominions treaties proper are submitted as a matter of course to Parliament before ratification, so within the Empire the Parliaments claim the right to decide, and whatever is agreed upon by a Prime Minister is subject to the view of his Parliament. More-

[1] See Chap. XXII. *post.*

over, the obligation which is assumed by a Prime Minister by agreement is not to stake his position on carrying out the policy which he has homologated. He retains the unfettered right to refuse to proceed further, if he finds that there is in his Parliament a spirit hostile to further action. The Dominion Prime Ministers in 1926 committed themselves to complete approval of the policy of the Locarno negotiations, but not even Mr. Coates, who had originally promised the adherence of New Zealand to the pact, proposed action in this sense to his Parliament.

It is curious that it was General Smuts,[1] as spokesman of South Africa, who protested against the refusal of the Labour Government in 1924 to implement the policy of preference which was agreed upon by the Imperial Government at the Conference of 1923. Yet nothing could be more clear than that a subsequent Government, elected on a policy which denied the possibility of carrying out the system of preference where it involved food taxation, could not possibly have defied its mandate and legislated in the sense desired. The Conference system rests on the doctrine of voluntary co-operation, not of binding agreements; its resolutions are not analogous to treaties, creating obligations, but are expressions of common purposes, whose execution may be postponed or laid aside, if action proves premature or unwise. The resolutions of the Conference of 1926 are, in like manner, not binding agreements. In part they can be given effect by common assent to adopt them in practice, as has already been the case in matters of treaty negotiation and communications

[1] House of Assembly, January 29, 1924, defending his speech at Johannesburg, December 14, 1923.

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between Governments; in part they must await further examination and be given validity—if it is finally decided that they are wise—by means of the one effective mode, legislation in the Imperial Parliament and the Dominions.

PART I

THE DEVELOPMENT OF INTERNAL SOVEREIGNTY

CHAPTER II

RESPONSIBLE GOVERNMENT AND CONSTITUTIONAL DEVELOPMENT

I. *The Grant of Responsible Government*

It is often forgotten that the early history of the American colonies presents certain analogies with the status which the Dominions have now attained. In the course of their arguments against the claim of the British Parliament to impose taxation on the colonies in America, the defenders of the rights of the colonies were gradually driven to investigate more and more closely the validity of the British claim of legislative sovereignty, until they arrived at the result that this sovereignty was a mere usurpation. It is impossible to accept as convincing the arguments of John Adams in *Novanglus* as applied to America in the eighteenth century, though they have recently found a redoubtable defender in Professor M'Ilwain.[1] In the view of Adams, the colonies were dominions of the King in his personal capacity, not of the Crown of England, nor were they parts of the realm. Over them Parliament had no jurisdiction, save in so far as the colonies chose

[1] *The American Constitution* (1923). For Ireland, see J. T. Ball, *Irish Legislative Systems* (1889).

to accept from Parliament the regulation of trade, as a matter vitally interesting them as well as the rest of the Empire. Their union with the United Kingdom was essentially a personal tie, a status which has attracted the attention of not a few Dominion statesmen of the present day. Adams, of course, was fighting once more the battle which had been waged for Ireland by Patrick Darcy and Sir Richard Bolton in 1641–4, by William Molyneux, by Swift, and finally with success by Henry Grattan, when the Volunteer movement in the midst of a great war forced concession from Great Britain. But in the case of America, as of Ireland, the claim that Parliament had no jurisdiction ran counter to the essential facts, which alone were valid evidence. In either instance it was easy to show that Parliament had asserted the absolute right to legislate, and that for a long period its legislation had been accepted as valid by local Legislatures and Courts no less than by the Courts of the United Kingdom. Yet it was true that before the latter years of Charles II. the authority of Parliament had been but slightly expressed over the colonies, and that Massachusetts in special had long and successfully maintained a position in which her people recognised only the duty of observing the terms of the Royal Charter and denied that they owed any obedience to the commands of Parliament.[1]

The loss of the American colonies, though directly due to less theoretical grounds, was unquestionably in one sense the outcome of fundamentally different views of the Constitution of the Empire. Some faint idea of the modern status of the Dominions was un-

[1] See C. M. Andrews, *Colonial Self-Government*, chap. iii. and xvi.

doubtedly present to the minds of American thinkers, but it was not to be expected that it would be appreciated in England, and it was only under stress of war and defeat that in 1778 the King was induced to readiness to consider the concession to the colonies of privileges which resemble the present status of the Dominions; nor is there much certainty of the genuineness of the intention to make the concessions suggested as a possible basis for the negotiation of peace. In any case, it is significant of the difficulty of the growth of that status that none of the protagonists in England of the colonial claims came forward with any practicable scheme for the adjustment of the issues in dispute; while Galloway's well-meant effort to secure acceptance by the Continental Congress of his constitutional proposals was defeated by the opponents of an amicable adjustment of the issues in dispute.

The vital outcome of the loss of the American colonies was the determination of the British Government to avoid the error to which was attributed the recent loss of the American Empire. The colonies, it was argued, had revolted because they enjoyed too much freedom, and in future all colonial Governments must be placed under effective safeguards to ensure loyalty. Even before the outbreak of the rebellion British policy had been decisively affected by its obvious approach. The Proclamation of 1763, which promised the establishment of English law and creation of representative Legislatures in the territories ceded by France in the Peace of Paris, was rendered null and void by the passing of the Quebec Act, 1774, denounced in the Declaration of Independence "for abolishing the free system of English laws in a neigh-

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bouring province, establishing therein an arbitrary Government, and enlarging its boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these colonies". Much may be said in favour of the generosity which secured to the conquered French their laws and religion; but on the other side must be set the admitted fact that Carleton from the first contemplated the use of the French as a means of quelling the rebellion in the Southern colonies, which he saw to be imminent, and that the interests of the English and American settlers who had been attracted to Canada by the Proclamation of 1763 were utterly ignored. The influx of settlers, expelled by the unwise action of the American colonies despite the grant of independence by the peace, compelled the concession of the Constitutional Act of 1791, which divided Canada into a French and an English Province and granted each a representative Legislature. But there was no intention to permit these Legislatures to exercise control over the administration of the Provinces. The Executive was no longer left, as in the American colonies, helpless before the Legislature, since it depended on it for its pay and had no military force at its disposal. Under the new régime the Executive could rely confidently on the support of a permanent Imperial force, whose numbers and equipment rendered any revolt impossible. For funds it had available receipts from Customs imposed under Imperial Acts and miscellaneous revenues from Crown lands, so that in Upper Canada the Legislature even by refusing supplies outright could inflict injury on none but its own constituents.[1] In Lower Canada the

[1] See A. Dunham, *Political Unrest in Upper Canada* (1927).

surrender in 1831 of the Customs revenue without securing a Civil List in lieu rendered the position of the Government less comfortable, but the Imperial Government stepped into the breach by advances from the military chest. The Legislature thus was impotent seriously to affect the policy of the Executive, and in legislation it was subject to the effective control of the Imperial Government, exercised through the Governor-General's power to withhold assent from Bills, and the power to disallow measures even if assented to; while in the background there remained the power of the Imperial Parliament to legislate, to overrule the opposition of the local Legislatures, and, if need be, as in 1838, to suspend their operation. It is clear that under these conditions effective sovereignty could not be held to rest in any measure in Canada.

It was the fundamental merit of Lord Durham to insist effectively on the only remedy for the conflict between the Executive and the Legislature inevitable under such a system. It is true that the issue was complicated by racial issues, and that Durham found the two nations in Canada deeply estranged. But the history of the Maritime Provinces attests the unsound character of the form of Constitution which then prevailed in North America. If the old régime to the south had allowed the Legislatures to dictate to the Executives, the new system removed the Executives from any salutary control, for Lord John Russell can scarcely have taken seriously his own assertions that they owed effective responsibility to the Crown and Parliament in the United Kingdom. Lord Durham was confronted with the obvious argument that to make the Executive responsible to the Legislature would be to grant in-

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dependence to the colonies, but he insisted that all that he proposed to do was to entrust to the people of the colonies "the execution of the laws, of which we have long entrusted the making solely to them. Perfectly aware of the value of our colonial possessions, and strongly impressed with the necessity of maintaining our connexion with them, I know not in what respect it can be desirable that we should interfere with their internal legislation in matters which do not affect their relations with the mother country. The matters which so concern us are very few. The constitution of the form of government; the regulation of foreign relations, and of trade with the mother country, the other British colonies, and foreign nations; and the disposal of the public lands, are the only points on which the mother country requires a control. The control is now sufficiently secured by the authority of the Imperial Legislature; by the protection which the colony derives from us against foreign enemies; by the beneficial terms which our laws secure to its trade; and by its share of the reciprocal benefit which would be conferred by a wise system of colonisation. A perfect subordination, on the part of the colony, on these points, is secured by the advantages which it finds in the continuation of its connexion with the Empire. It certainly is not strengthened, but greatly weakened, by a vexatious interference on the part of the home Government with the enactment of laws for regulating the internal concerns of the colony, or in the selection of the persons entrusted with their execution." The colonists were the chief sufferers from bad laws, and should be allowed to remedy their errors by experience; nor was it worth while for the British Government to maintain an expensive military

establishment merely to secure the power of exercising a limited patronage.

It is clear that Lord Durham's solution was not a final settlement of the issue of the relations between the colonies and the mother country in cases where the colonists are fully competent to exercise the political rights enjoyed by their fellow-subjects in the United Kingdom. But Lord John Russell's criticisms of theoretic defects in his conception were accompanied by the decision to permit the Governor-General of Canada to adopt what was essential in the new proposals, by selecting his advisers from those who commanded the support of the majority of the Legislature, in lieu of relying, as under the old system, on the guidance of officers who were anathema to the majority of the elected representatives of the people. Joseph Howe, moreover, on the basis of his experience in Nova Scotian politics, answered effectively, in a series of letters, the objections urged by Lord John Russell, insisting on the limited field of responsibility proposed by Lord Durham, and on the reality of the evils which the new scheme was intended to remedy. To Lord Durham, therefore, in fact, belongs the credit of securing the first real recognition of a measure of sovereignty as appertaining to the legislature and government of the colonies. He marked out, vaguely no doubt, a sphere in which the Imperial Parliament and Government were to abandon their legislative and administrative control and permit the unfettered operation of the decisions taken by the representatives of the people of the colonies in their Legislatures. With statesman-like prudence, he declined to attempt any precise definition of the extent to which the Imperial powers should be renounced, content to

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leave to practical operation the determination of the exact limits of Imperial abnegation.

In form, therefore, the framework of colonial government was left unimpaired. The Governor continued to owe his appointment solely to the Crown, to which, as represented by the Imperial Government, he remained responsible. The executive government was vested in him, partly by delegation of the Royal prerogative, partly by Imperial and colonial legislation; and in the exercise of his functions he was aided by an Executive Council, whose members under the new régime were chosen by reason of their ability to command the support of the majority of the representative House of the Legislature, but who held office at the Governor's pleasure. The control of the departments of the Government was exercised by members of the Council as Ministers of State, and powers were with increasing frequence delegated to them by colonial Acts. But in this capacity also they were dependent on the pleasure of the Governor. The Legislature was still restricted in its power of legislation by the necessity of securing the Governor's assent, and Imperial instructions forbade his assent to many kinds of Bills, requiring that they should be reserved for the consideration of the Imperial Government. The Imperial Parliament remained competent and ready to intervene by legislation on all matters of general Imperial interest, and it reserved full authority even to deal with local issues, if that were deemed necessary. Subordination to Imperial law was enforced by the courts, whose Judges were now rendered independent of the caprice of the Legislature by the assignment of permanent salaries, while being accorded by practice or law permanence of

tenure of office; if they failed to do their duty, their judgments could be amended by the Privy Council, whose power to hear appeals from all courts in the colonies was formally placed on a statutory basis by the Judicial Committee Act, 1844. But the crucial decision to alter the character of the Executive Council opened up the way to emancipation from Imperial authority. The close Imperial control exercised over the colonies rested on the belief that only thus could their continued connexion with the mother country be assured. When Lord Durham recognised that freedom was infinitely more likely to breed loyalty than subjection, he paved the way to a complete alteration in the doctrine of responsibility. An executive Government must in a modern democratic polity owe responsibility to some authority. Under the old régime a colonial Executive had been subject to the nominal and ineffective control of the Imperial Parliament; now it was to become responsible to the local Legislature, and it followed inevitably that the powers of that Legislature must expand. Lord Durham saw clearly that it was not enough to permit the people of Canada to control the executive power as it stood; they must have the authority to extend as they thought fit the compass of executive authority through the enactment of Acts which under the old régime were forbidden to local Legislatures.

It is difficult at the present day, in view of the almost unlimited authority of Dominion Parliaments, to realise how restricted was, even in internal matters, the sovereign authority permitted to colonial Legislatures. A sovereign State possesses, as a matter of course, the fullest power to establish its own Constitution; to define who shall be its nationals; to exercise authority over

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every class of its inhabitants and to regulate their political status; to preserve itself from the immigration of undesirable persons; to regulate all questions of personal status affecting persons resident within its limits; to control its lands and to deal with all matters of property and civil rights; to regulate trade and currency; to control merchant shipping; to provide for defence and order; and to regulate all matters ecclesiastical. But it is only by degrees that the colonies have achieved powers of sovereignty in regard to these topics, and their present position can be understood solely in the light of this history of emancipation. It has been a peaceful progress, concessions by the Imperial Government following naturally on the development of the colonies in population, in wealth, and in sense of responsibility; and it has been rendered possible by the freedom of the colonies from the anxieties and obligations which attend States in enjoyment of external sovereignty, and which may gravely react on their internal development. The attainment of almost complete internal sovereignty came to pass during a period when the supremacy of the British fleet assured the colonies of freedom from any probable foreign attack, and statesmen could demand the grant of further powers without having to face the question how far the colonies possessed the resources to protect themselves against external interference.

Some of these matters, it is true, border on the sphere of external relations, but on the whole it was possible for the issues to be dealt with by the colonies and the Imperial Government with comparative indifference to foreign States. It would have been different had immigration and trade policy been deemed to be matters

in which foreign Powers could legitimately put forward claims to favourable treatment. But Dominion autonomy was worked out before international law had come to the point of regarding any foreign country as having a right to criticise the determination of any territory to close its ports to any immigrants, save such as it might deem desirable; nor, indeed, even at the present time[1] has immigration become a matter outside domestic jurisdiction. Tariffs still remain outside the bounds of international causes of complaint, and the vital issue of the powers of the colonies to determine their own tariff policy was decided with reference only to their relations to the United Kingdom.

The extension of colonial sovereignty was not merely intensive, but extensive. The Imperial Government, once it had accepted in practice the guidance of Lord Durham, had no desire to deny the benefits of the new system to any territory which could fairly be deemed worthy to exercise responsibility. Indeed, on the whole, the criticism may rather be that it was rather too anxious to transfer responsibility to communities which were hardly ripe for the burden. There could, however, be no doubt of the wisdom which encouraged the adoption of the new system not merely in the now united Canada, but also in Nova Scotia and New Brunswick, though the politicians of these two provinces were inclined for a while to look somewhat askance at the new system. It was not even withheld from the tiny population of Prince Edward Island, despite the complication introduced by the presence of an acute problem raised through the improvidence of the Royal grant of the soil of the island to absentee proprietors, whose lands the

[1] Wheaton, *International Law* (6th ed.), i. 574, 600.

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people were eager to resume without compensation. Newfoundland might well have been deemed unfit for its exercise, for the representative Legislature created in 1832 had shown a singular incapacity for moderation;[1] but here again the principle was conceded in 1855. The same year saw the definite acceptance of the régime in the great colonies of New South Wales, Victoria, and South Australia and in the island of Tasmania; it had already been granted to New Zealand, and on its separation from New South Wales in 1859 Queensland fell under the new régime as a matter of course. Experience dictated that it should be adopted by the Canadian Dominion when formed in 1867, and the régime was duly extended to Manitoba and British Columbia in 1870, and to the newly created provinces of Saskatchewan and Alberta in 1905. In Australia the vast area of Western Australia was too scantily populated to achieve the boon until 1890, and the grant of responsible government was soon followed up by the creation in 1900 of the Commonwealth of Australia to share their sovereignty with the six Australian colonies, now created States. In South Africa the presence of large native populations both within and without British territory caused long delays in the grant of responsibility: the concession made to the Cape of Good Hope in 1872 was worthily used; that to Natal in 1893 imposed a burden on the European settlers which proved too great for their strength. The concession of responsible government to the conquered colonies of the Transvaal and the Orange River Colony in 1906 and 1907 proved to be a stroke of high statesmanship on the part of Sir Henry Campbell-Bannerman; it was the indispensable

[1] Prowse, *Newfoundland*, pp. 432-8, 443-8.

prelude to the creation of the Union of South Africa in 1909. Even more striking was the creation in 1922 of the Irish Free State with Dominion status and a system of responsible government under a rigid constitutional enactment. This brought up to six the tale of the Dominions, as these fully self-governing colonies have been styled by decision of the Colonial Conference of 1907. The measure of internal sovereignty which has been accorded to Malta in 1921 and to Southern Rhodesia in 1923 is comparatively restricted, and neither colony is admitted to separate membership of the Imperial Conference. Even within the category of the Dominions there is one distinction. Newfoundland has, indeed, the same measure of internal sovereignty as the great Dominions, but her external sovereignty is of a definitely limited nature, as the result of her exclusion from membership of the League of Nations as an independent unit of the British Empire.

The mode in which the sovereignty of the Dominions has been asserted has consisted in very large measure of the growth of constitutional Conventions, under which rights appertaining by law to the Imperial Government have been limited in operation or utterly disused. In some systems of law, disuse is equivalent to abolition; thus in Scots law a statute may become obsolete, so that it cannot successfully be appealed to in the law courts. But English law does not admit this doctrine, and legal powers, therefore, cannot be said to cease to exist because they are not exercised. It is, for instance, true that the Royal veto on legislation has not been called into operation since the reign of Queen Anne, but its disuse has not destroyed the possibility, in a crisis, of its exercise; and, therefore, in the

case of the Dominions the disuse of existing legal powers has not deprived them of existence. On the other hand, the very fact that powers could after disuse be revived if necessary has tended largely to help the process of the growth of self-government. When the power remained in case of emergency, it was easy enough to forgo its actual operation; if the necessity had had to be faced of formally abolishing the power, it might have been felt impossible to take the risk, and its deliberate retention might have encouraged its employment. In some cases the relaxation of control has taken the form of positive enactment, conferring fresh authority on local Legislatures, or of prerogative orders and instructions extending the sphere of the authority of local Governments by entrusting to them discretion in the exercise of the powers of the Crown.

The extension of the area of responsible government has been a factor of the highest importance in accelerating the development of Dominion sovereignty. Each important concession made to any one Dominion has almost as a matter of course been extended to all the others, and invasion of the powers of the Dominions has been rendered difficult by the certainty that any apparent encroachment on the rights of one would be resented by all. It is clear that the circumstances under which in 1906 Lord Elgin sought to control the exercise of martial law in Natal were of a unique character, and in no wise menaced the autonomy of the Dominions in general. His action was based on the obvious fact that it was only the presence of Imperial forces in the colony which empowered the Ministry to take the risk of the drastic enforcement of martial law. But his position was resented by the Commonwealth of Australia,

without any investigation of the facts, merely on the general principle of the autonomy of the Dominions, and Lord Elgin yielded the point at issue.

It is unnecessary to trace in detail the course of the growth of Dominion sovereignty for each colony. But the salient features of the advance may be sketched under its chief aspects; these may be classed, conveniently, if without strict logical order, as: I. Legislative and Constituent Powers; II. Nationality; III. Control of Native Races; IV. Control of Immigration; V. Regulation of Status; VI. Regulation of Land and Civil Rights; VII. Trade and Currency; VIII. Merchant Shipping; IX. Defence; X. Ecclesiastical Affairs.

II. *Legislative and Constituent Powers*

We have already noted that the Imperial Government was prepared generously to extend to the other colonies the concessions granted to Canada, and it adopted in 1852 the wise course of entrusting to the colonies themselves the duty of devising their forms of Constitution.[1] It was, indeed, at first thought that the Imperial Government would insist on the maintenance of nominee upper chambers in Australia, but this view was emphatically repudiated, and the Constitutions of Victoria, Tasmania, and South Australia were provided by local decision with elective upper houses; the motive animating the framers of these Constitutions was to prevent the growth of aristocratic upper chambers thwarting the will of the people, but in practice it proved that these colonies and Western Australia, which followed their example, had created for themselves powerful

[1] See E. Sweetman, *Australian Constitutional Development* (1925).

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chambers likely to check the general movement towards democratic legislation. No safeguards were insisted on, and earnest consideration was given by the Imperial Government to the desire of the colonies that an effort should be made to define those matters which appertained to colonial sovereignty and those which fell within the scope of Imperial power. This early attempt to distribute sovereignty deserves mention in detail. The Governor, it was proposed, would normally assent or refuse assent to local measures without reference to the Imperial Government, which would have no authority over such measures. On the other hand, the Governor might reserve for its consideration, or, if he assented, it might disallow, Bills falling within the following classes: (1) Bills affecting allegiance and naturalisation; (2) Bills relating to treaties or political intercourse or communications between the colony and officers of foreign Powers; (3) Bills relating to the employment, command, and discipline of Her Majesty's sea and land forces within the colony and matters pertaining to its defence, including the command of the local militia and marine; and (4) Bills regarding high treason. Mr. Gladstone himself was anxious to secure agreement in some analogous distribution of authority, but, wisely no doubt, the attempt was abandoned, and the way was left open for development of autonomy on all and every head. In accordance with the tendency of the day, changes in the Constitutions adopted were hedged round with certain restrictions, but these were imposed rather by the desire of the colonies than of the Imperial Government, which speedily proved its anxiety to remove all needless fetters on colonial legislative powers.

In this case formal enactment became necessary, largely as the outcome of the intransigence of a colonial Judge, Mr. Boothby, in South Australia. To his rather narrowly legal mind the wide departures from British precedent which had been adopted in the South Australian Constitution were abhorrent, and he found a means of declaring much South Australian legislation invalid by insisting rigidly on the doctrine that the legislative powers of the colonies were subject to the rule that their Acts must not be repugnant to English law. This restriction, which was imposed from the earliest days of oversea colonisation, was doubtless in its inception no more than a pious injunction to subordinate Legislatures not to violate the fundamental principles of British jurisprudence. But it was capable of receiving, and was now accorded, a much more limited meaning at the hands of Mr. Boothby. The new Constitution was invalid because it created an elective upper chamber which the Crown could not dissolve; required that the Attorney-General must be a Minister of the Crown and have a seat in Parliament; and excused persons appointed to ministerial office from vacating their seats in Parliament. Moreover, he ruled that any Act which was assented by the Governor in violation of the Royal instructions as to reservation of Bills was invalid. It was clear that the benevolent intentions of the Imperial Government would be thwarted if these rulings stood, and with the approval of the Law Officers of the Crown a statute was enacted which for long was the Magna Charta of colonial autonomy, the Colonial Laws Validity Act, 1865.

The essential feature of this measure is that it abolished once and for all the vague doctrine of repug-

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nancy to the principles of English law as a source of invalidity of any colonial Act. In place of this, an Act is invalid only if it is inconsistent with the provisions of some Imperial Act, or order or regulation made under and having the force of such an Act, which is applicable to the colony. The boon thus conferred was enormous; it was now necessary only for the colonial legislator to ascertain that there was no Imperial Act applicable, and his field of action and choice of means became unfettered. The Legislature was thus emancipated from the control of the Courts by depriving the latter of any power of deciding what were the principles of English law and how far colonial proposals ran counter to them. It was also provided that Acts should not be invalidated by the fact that they had been assented to by the Governor in disobedience to Royal instructions, unless these instructions specifically formed part of the colonial Constitution. There was removed by this decision a most serious handicap to freedom of legislation by the colonies; and their power was further enhanced by the specific declaration that they were authorised to establish, abolish, and reconstitute Courts of Justice, and to alter the colonial Constitutions, subject only to the observance of such conditions as might expressly be laid down in the colonial Constitutions regarding the mode of change. This last concession was of special value, for it definitely removed any doubt as to the constituent authority of the colonial Parliaments, and asserted the right of these Parliaments to remodel their Constitutions from time to time. But it also enabled the colonies to protect themselves against hasty change without due consideration, a power which is denied to the sovereign

and unfettered authority of the Imperial Parliament, which cannot bind a successor by any rule. In view of the supremacy of Imperial legislation and the Colonial Laws Validity Act, if the rules which from time to time dictate the exact mode in which a colony may alter its Constitution are not observed, the alterations improperly effected are null and void.

Scarcely had this great Act been passed than the Imperial Government played a striking part in the creation of the Dominion of Canada. If there had been any desire on the part of that Government to fetter the development of colonial autonomy, it would, of course, have refused to assist in any process which would weld together the scattered colonies and inevitably increase enormously their power as opposed to that of the United Kingdom. It is true that the importance of defence was a strong motive for the action of the Imperial Government, but it is clear that it had no jealous desire to retain power, and that it gladly contemplated the inevitable loss of authority when it ceased to play the part of the power which was the sole effective bond of unity between the scattered Governments of Canada. Sir John Macdonald perhaps realised the significance of what was being accomplished more clearly than anyone else. His suggestion[1] that the new unit should be given the style of "Kingdom of Canada" was vetoed by Lord Derby—who feared, with some reason, that it would arouse ill-feeling in the United States—but he emphasised in all his dealings with the Imperial Government and in his speeches to the people of Canada the fact that what was being called into existence was no mere colony but a subordinate kingdom. The

[1] J. Pope, *Memoirs of Sir John A. Macdonald*, i. 313.

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event was brought about in part by the exercise of an undue measure of Imperial authority. The Lieutenant-Governor of New Brunswick was instructed to put pressure on his Ministers to accept the proposed federation, and in his action he undoubtedly violated the rules of responsible government. But the creation of the Dominion was the greatest asset to supporters of responsible government. There now existed a Ministry which could speak for a continent of such potential wealth and population that the old colonial relation was manifestly outworn and new doctrines could be enforced.

In the recognition of the change of circumstances the decisive step was taken in Canada. The new position was expressed with much clearness and steadfastness by Mr. Edward Blake, Minister of Justice, in his correspondence with Lord Carnarvon on the question of the terms of the Letters Patent and Royal instructions which it was intended to issue to the Governor-General of Canada, defining the extent of his authority under the prerogative and the mode of its exercise. The rules proposed by the Imperial Government took no account of the vital changes which had occurred under the régime of responsible government. The Governor-General was authorised to act without consulting his Council in minor or urgent matters, and to overrule his Council if he thought fit; he was forbidden to assent to a long list of measures,[1] which he was required to reserve for the consideration of the

[1] These included divorce; paper money as legal tender; differential duties; Bills inconsistent with treaties; Bills affecting the control of the Imperial Forces; Bills of an extraordinary nature affecting the prerogative or the rights of British subjects outside Canada or British trade or shipping.

Imperial Government; and in the matter of exercising the prerogative of pardon he was required in capital cases to exercise a personal discretion. Mr. Blake opposed to the underlying conception of colonial status contained in these proposals the doctrine of Canada as enjoying complete autonomy save in such matters as fell under Imperial authority, on the ground that Canada was not a State under international law but a dependency of the United Kingdom. The Governor-General must, and did, act through Ministers, and his relation to them—apart from any cases in which special Imperial interests were involved—must be similar to that of the Crown in the United Kingdom. He deprecated any reservation of legislation for Imperial consideration; if any Act were deemed dangerous to Imperial interests, it should be formally disallowed on the authority of the Imperial Government, not reserved by the Governor-General against the wishes of his Ministers. Pardons also should be matters for ministerial decision, unless indeed some Imperial interest might be involved. The Imperial Government yielded in part to his arguments. The right of the Governor-General to reject ministerial advice was no longer formally included in the instruments; the list of Bills to which assent could not be given was withdrawn, special instructions being sent in lieu in regard to any doubtful Bill; and intervention in cases of pardon was expressly confined to cases where Imperial interests might be involved. In themselves the concessions might seem slight in importance, but they were essential recognitions that the period of Dominion subordination was passing by.

As usual, the advantage gained by one colony

enured to the benefit of others. Governors still were required in murder cases to exercise a personal discretion; but in 1891 Lord Onslow reported that his Ministers in New Zealand held that these matters also should be entrusted to Ministers, and advocated the change of practice, which was extended to all the Australian colonies, the Governors being required to intervene in matters of pardon only when the interests of the Empire or foreign countries might be concerned. New Zealand in 1892 was to furnish a still more striking proof of the abandonment of Imperial control. Heretofore it had been deemed the duty of the Governor to maintain the independence of the nominated upper house by refusing to swamp it, and Lord Glasgow, who succeeded Lord Onslow, maintained this position. But he was overruled by the Secretary of State for the Colonies, who instructed him to yield to his Ministers; and in recognition of the importance of this episode the date of the decision has been commemorated by being adopted as Dominion Day in New Zealand.

More far-reaching were the issues which presented themselves during the framing of the Constitution of the Commonwealth of Australia. In accordance with precedent, the Constitution was prepared by the Governments and people of Australia and was presented to the Imperial Government for enactment in an agreed form. In the case of the Canadian Constitution the procedure had been simpler; resolutions had been accepted as the basis of the new Constitution in 1864, and their final working up into statutory form was completed in London, thus evading any serious dispute. The new procedure placed the Imperial Government in a difficult and delicate position, especi-

ally as the delegation to secure the enactment of the measure arrived in London during the Boer war, when the attention of the Government and the country alike was immersed in war problems. Three important issues emerged. In the first place, it was desired by the delegates that the principles of the Colonial Laws Validity Act should not be deemed applicable to the legislation of the new Commonwealth, and that Commonwealth Acts should have unrestricted validity in Australia. To this proposal a definite negative was returned ; nor does it appear that its implications had been sufficiently thought out by the delegates, nor had they any clear mandate for their request. Secondly, it was desired that the laws of the Commonwealth should be given a wider territorial effect than that enjoyed by ordinary colonial laws. It is established that colonial legislative power extends only to the territory of the colony and its territorial waters, unless special extension has been granted by Imperial legislation, but it was held that this limitation was inconvenient. In the ultimate result, the Imperial Government consented that the laws of the Commonwealth should be given effect on all ships, save the Queen's ships of war, whose first port of clearance and port of destination were in the Commonwealth. The proposal was clearly reasonable, as it enabled the Commonwealth to regulate ships whose headquarters were virtually in the Commonwealth, whose ports formed the beginning and end of their cruises among the Pacific islands; and the concession was readily accorded in this limited form.

The third claim of the delegates raised far more difficult issues. It was the desire of the lawyers and politicians who drafted the Constitution that the inter-

pretation of constitutional issues should rest not (as in the case of Canada) with the Judicial Committee of the Privy Council but with the High Court of the Commonwealth. The insistence placed on this point was natural enough. The Constitution was the work of men such as Sir Samuel Griffith, who were deeply interested in the Constitution of the United States, and it was based, as regards distribution of powers between the central and the State Parliaments, largely on the model of the American Constitution. In accordance with that model, the residuary powers of sovereignty were left with the States; whereas in Canada the federal Parliament was accorded all authority not expressly vested by the British North America Act in the provinces. It was frankly recognised in the case of Australia that conflicts of authority between the federation and the States were inevitable, and the American model suggested that a court to dispose of these conflicts was absolutely essential. In the case of Canada, the framers of the scheme of federation held the rather remarkable view that the definition of central and provincial powers which they gave was such as would obviate any difficulties of interpretation, and they, therefore, merely provided for the possibility of the creation of a federal court. When in due course this court was created, it was contemplated that its jurisdiction should be final; but the British Government was not to be induced to accept this suggestion, and the Act, as passed, expressly preserved the right of the Crown to exercise through the Judicial Committee of the Privy Council the power of final decision of such issues as were held by that body proper matters for its decision. The reservation of this right to hear appeals

proved of the utmost value to Canada, for it enabled vexed issues, involving the rights of French Canadians, to be decided, not in the heated atmosphere of a federal court, but in the calm detachment of a court whose members were immune from the pressure of partisan opinion. None the less, the framers of the Australian federation were opposed to permitting intervention by the Privy Council. They could plead that Australia was free from those racial and religious divisions which rendered a final appeal to the Privy Council of importance to Canada, and that it was for the Australians themselves to settle matters of the relative powers of the new federation and the States. Stress was also laid on the expense and delay inevitable in the case of appeals, and it could not be denied that these features were of considerably greater importance than in the case of Canada.

Mr. Chamberlain was reluctant to concede the demands of the Australian delegation, but his hand was forced in some degree by the attitude of the Opposition, which was believed to be ready to support the claims of the delegates. It seemed probable, therefore, that instead of the Act constituting the Commonwealth passing through Parliament with general acclamation as best fitted so important an occasion, there would arise an acrimonious party debate, the more to be deprecated in view of the splendid generosity with which the Australian colonies had rallied to the aid of the mother country in the war with the Boer Republics. A compromise was, therefore, effected, under which the appeal to the Privy Council, by special leave of that body, was left intact in all cases save those involving the constitutional relations of

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the Commonwealth and a State or States, or of the States *inter se*. Even in such cases an appeal might be brought if a certificate were given by the High Court that the cause concerned was one in which decision by the Crown in Council was, for any reason, appropriate. In effect, however, the concession meant that the interpretation of the Commonwealth Constitution would lie with the High Court of the Commonwealth, and the first breach was thus made in the traditional doctrine that an appeal lay to the Crown in Council from the decision of any colonial court.

But the desire of the Imperial Government to accept the wish of the Commonwealth to assert in the fullest manner her sovereign powers was destined to be subjected to a further strain, and the ready acquiescence of that Government in the wishes of the Commonwealth is significant of the development of Dominion autonomy. The settlement of 1900 was not such as absolutely to bar the Privy Council from dealing with constitutional issues, for it remained open to suitors to appeal from decisions of the Supreme Courts of the States on constitutional questions direct to the Privy Council, ignoring the High Court. Such action might have been avoided in practice had the decisions of that august tribunal given general satisfaction in the Commonwealth, but the decision of the Justices of the Court to interpret the Constitution on American lines proved disconcerting to several State Governments. The issue came to a head on the question of the right of the States to levy income tax on the salaries of federal Ministers, and the High Court [1] laid

[1] *Deakin* v. *Webb*, 1 C.L.R. 585. See Keith, *Journal of the Society of Comparative Legislation*, xii. 95.

it down that the States had not that power, applying to Australian conditions the doctrine of the exemption of federal instrumentalities from State control which had been evolved by Chief Justice Marshall in the United States. It may be doubted whether the application of the doctrine was at all necessary, and many years later it was in effect abandoned by the High Court itself.[1] It owed its development in the United States to the necessity of protecting federal banking establishments from the effort of the States to tax them out of existence, and it was hardly wise to extend it to the normal incidence of a modest income tax on federal (together with all other) salaries. Hence the decision of the High Court led to the determination in Victoria to obtain a ruling from the Privy Council, and in a historic case, *Webb* v. *Outtrim*,[2] the desired result was achieved on a direct appeal from the Supreme Court of Victoria to the Privy Council. It was in vain that it was contended before the Privy Council that no appeal was competent, as the State Court was exercising federal jurisdiction. The Privy Council, doubtless correctly, overruled the contention and on the merits decided that the High Court had applied illegitimately American doctrines to the interpretation of an Imperial Act, and that the States could levy income tax from federal officers. But the decision of the Privy Council was denied effect by the High Court in the next case[3] which came before it, and in which the State Court had given effect to the ruling of the

[1] *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.*, 28 C.L.R. 129.

[2] [1907] A.C. 81.

[3] *Baxter* v. *Commissioners of Taxation, New South Wales*, 4 C.L.R. 1087.

Privy Council on the score that it was a Court of higher authority than the High Court. It asserted, with perhaps excessive emphasis, that it was its function and not that of the Privy Council under the Constitution to interpret the federal scheme, and it ruled that the States could not levy income tax. The deadlock was thus absolute, but the ingenuity of the lawyers of the Commonwealth found a way out. The grievance of the States was removed in practice by an Act of 1907, which authorised their levying income tax from the salaries of federal officers on the same basis as it was levied on State salaries. At the same time advantage was taken of the provision of the Constitution empowering the Parliament to define the federal jurisdiction of the State Supreme Courts, to oust that jurisdiction in any case involving the constitutional relations of the Commonwealth and the States, or of the States *inter se*. The only danger now was that the Imperial Government would require that the Bill for this measure should be reserved, in view of the important constitutional issue involved. But it was ascertained from Mr. Deakin, who himself would not have resented reservation on this ground, that the step would be made a matter of protest by the Opposition, and the British Government at once made it clear that it had no desire to prevent the Act having such operation as might be decided by the courts to belong to it. The validity of the Act has since been affirmed; and in this manner, with the full and ungrudging assent of the British Government, the Australian High Court has been made the final arbiter of the interpretation of the Commonwealth Constitution.

Yet another proof was shortly to be made of the readiness of the United Kingdom to share sovereignty with the Dominions. It was a decidedly generous attitude to afford the utmost encouragement to the South African colonies, two of them but lately conquered, to form a Union. There was no doubt on any side as to one of the motives for the amalgamation. Lord Selborne, in his famous memorandum urging the adoption of some form of federation, had stressed the fact that by this means Imperial influence in South Africa would be drastically reduced. Nor was the British Government without very special obligations in South Africa. By the influence of British statesmen the natives of the Cape had been accorded the franchise when the grant of representative government was made to that colony in 1853, and they had preserved it since responsible government, though restrictive legislation had been passed under which certain property and educational qualifications prevented the acquisition of the vote by the mere savage or semi-savage native.[1] In the Transvaal and the Orange Free State under Boer rule no equality in Church or State had been conceded to the native, and there was thus grave danger lest under a Union of the colonies the native vote of the Cape would be surrendered in order to gratify the racial feeling in the Transvaal and the Orange Free State. Certain safeguards were inserted, partly as a result of the influence of Lord Selborne and partly in deference to the views of the Cape Government, but the final outcome of the negotiations was accepted and loyally defended by the Liberal

[1] W. M. Macmillan, *The Cape Colour Problem* (1927); R. L. Buell, *The Native Problem in Africa*, I. chap. iv.

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Government of the United Kingdom against the not unfounded fears of many of their own supporters that the compromise embodied in the Bill would not long stand. Moreover, the Imperial Government intimated its readiness to consider at a later date the handing over to the administration of the Union of the native territories of Basutoland, the Bechuanaland Protectorate, and Swaziland, which still remained under its administration, subject to certain assurances for their just government. Nor was the request of the South African Governments for the inclusion in the Imperial Act creating the Union of a provision restricting appeals to the Privy Council to cases finally decided in the Appellate Division of the Supreme Court of the Union refused, though it was admitted that it was based on the desire to reduce to a minimum resort to the Imperial Court.

Difficult issues had also to be faced on the creation of the Irish Free State. The treaty of December 5, 1921, had conceded to the Free State the right to a Constitution on the Canadian model, save in so far as provision to the contrary was not made in the treaty itself. But, when submitted for acceptance, it soon appeared that the framers of the Irish Constitution had advanced in many points beyond the exemplar which was to be followed.[1] Responsible government in Canada rests essentially on constitutional convention, while in the new Constitution it is enforced by law, and this is carried wholly beyond all Dominion and British precedent by providing that the Dail cannot be dissolved on the advice of an Executive Council which has lost the confidence of the majority of that body. None the

[1] Keith, *Journal of Comparative Legislation*, 1923, pp. 120-24.

less, these novel provisions were acquiesced in. More difficulty was raised by the desire of the Free State to omit the power of disallowance of legislation which is given to the Imperial Government under the British North America Act, but it was felt sufficient to secure the right of the Governor-General to reserve legislation for the consideration of the Imperial Government. It is interesting to note that a very distinct change of attitude was adopted in this case in comparison with the opinion of Mr. Blake as regards Canada. In his view it was more consonant with the true relation between the Dominion and the United Kingdom that disallowance of an Act duly assented to should take place, although the inconvenience of this course is obvious. In Ireland, while the refusal of assent is deemed impossible, it is held that the proper procedure should be by the process of reservation, should the Imperial Government hold any Bill of the Free State open to fatal objection.

The issue of the appeal to the Privy Council presented itself, as was inevitable: for the idea of such an appeal was bitterly opposed by a strong body of Irish opinion, and was without any support save the feeling that the model of Canada dictated provision for an appeal. Eventually, under strong pressure from the Imperial Government, the Irish Government yielded the point, and the Constitution provided for such an appeal by special leave of the Privy Council, the intention clearly being that it should be confined to constitutional issues of high importance. No exception, on the other hand, was taken by the Imperial Government to the declaration in the Constitution under which the Irish Free State, save in the case of invasion, was not

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to be involved in active participation in war without the assent of Parliament; nor to the somewhat obviously inaccurate assertion that all powers of government in the Free State and all authority, legislative, executive, and judicial, were derived from the people of Ireland.

A like attitude of ready acceptance of Dominion wishes was manifested by the Imperial Government during the bitter controversy on the flag issue waged in the Union of South Africa between 1925 and 1927. The original movement in that Dominion in favour of a national flag was unquestionably motived by hostility to the Union Jack, and was often associated with resentment of the British connexion and aspirations for independence. As proposed in the Bill fathered by the Government in 1926, the design of the national flag was based on the Transvaal Vierkleur, and the Union Jack formed no part of it. It was hoped for a time that the admission of sovereign independence, which was, in the view of General Hertzog, made by the Imperial Conference in that year, would obviate the necessity of proceeding with so controversial a measure. But pressure by the more extreme members of the Nationalist Party compelled action on the part of the Government, which offered as a compromise a design in which the Union Jack would have been accorded a somewhat microscopic portion of the area of the flag. It was, however, made clear that the design would not be used unless and until it had been approved at a referendum to be held after the Bill had been given the approval of Parliament. So obvious was it that the referendum would raise grave racial feeling, that wiser counsels finally prevailed, and a compromise was reached be-

tween Generals Hertzog and Smuts. The compromise, carried into effect by an Act of 1927, established two flags in the Union: the Union Jack, to denote the association of the Union with the British Commonwealth of Nations, and the National Flag, in the design of which are united the old flags of the Orange Free State and the Transvaal and the Union Jack. Both flags are flown from the Houses of Parliament, from the principal Government buildings in the capitals of the Union and the provinces, at the Union ports, in Government offices abroad, and at such other places in the Union as the Government may determine. It has thus been possible to meet the demand of the people of Natal for the free use of the Union Jack, while the blending of emblems in the new National Flag may be regarded as a symbol of the union of peoples in South Africa. Save for its cordial approval of the settlement, the British Government remained aloof from the struggle, despite its natural sympathy with those in the Union who held that the effort to eliminate the Union Jack was a policy based on racial rancour and was bound to increase bitterness between the two great strains of the white population. Nor, it may be added, was the dispute likely to render cordial the relations between Southern Rhodesia, with its distinctly British orientation, and its important neighbour.

CHAPTER III

NATIONALITY, NATIVE RACES, AND IMMIGRATION

I. *Nationality*

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THERE are obvious difficulties in the question of the power of a subordinate Legislature to provide for the admission of aliens to the enjoyment of British nationality. It was early recognised that the general rules of nationality must be those provided by the Imperial Parliament, but especially in Upper Canada during the period 1822–7 the need was felt for machinery by which American citizens with British affiliations could be transformed into loyal Canadian British subjects, without conforming to the elaborate regulations under which alone Imperial legislation provided for naturalisation.[1] The problem was ultimately solved by the adoption of the view that, besides Imperial naturalisation, there should be allowed naturalisation under the authority of local Acts, a principle which became permanently operative under the Naturalisation Act, 1870. But there was held to be a marked distinction between naturalisation obtained under Imperial legislation in the United Kingdom and that resulting from naturalisation under a colonial Act. The former created for the person concerned the status of a British subject, valid

[1] A. Dunham, *Political Unrest in Upper Canada, 1815–1836*, chap. v.

throughout the Empire and, so far as international law provided, elsewhere. The effect of naturalisation in a colony, on the other hand, was ruled to be absolutely local. Such persons in the United Kingdom were merely aliens, as many individuals found to their great inconvenience during the war of 1914–18. In normal conditions this fact was of no serious disadvantage, in view of the generosity with which aliens were treated in the United Kingdom; while, when abroad, diplomatic protection was freely and fully extended to such naturalised persons. There was, therefore, considerable delay before the further step could be taken and arrangements made for recognising in the Parliaments of the Dominions the capacity not merely to confer a local status but to admit aliens into complete membership of the British Empire.

This gain in capacity was conferred on the Dominions by the British Nationality and Status of Aliens Act, 1914. The measure was noteworthy in two ways. The Imperial Parliament was not prepared to abandon its unquestioned right of defining the conditions which made a man a natural-born British subject; but, whereas the Act of 1870 had been passed without consultation with the Dominions, the new definition was enacted only after the fullest discussion of the issue at the Imperial Conference of 1911 and with full Dominion assent. In the second place, the conditions for naturalisation of aliens were now laid down with the same assent and with important changes, of which the most vital was the acceptance of residence in any part of the Empire as equivalent to residence in the United Kingdom as a qualification for admission to British nationality. Moreover, naturalisation in the United Kingdom was

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no longer to confer the status of a British subject in any Dominion unless the Dominion should adopt by legislation the naturalisation provisions of the Act. If, however, it took this step, then the Government of that Dominion would have the power to confer a naturalisation which would have validity in the United Kingdom and throughout the Empire generally, save only in any Dominion which did not adopt the Act. Curiously enough, this increase of authority was only slowly appreciated in the Dominions, and it was not until 1928 that New Zealand followed the example set by the other Dominions and adopted the British Act. By that time the Act had suffered certain alterations, including an important extension of the definition of natural-born British subject, intended to secure maintenance of British nationality to persons settled in foreign countries; and it is characteristic of the new status claimed by the Dominions that the changes in the Act were re-enacted for the Dominions by their Parliaments. In strict law, no doubt, these enactments were unnecessary, for it is clear that the Imperial Act is intended to have general application, but the constitutional propriety of simultaneous legislation was not questioned by the Imperial Government.[1]

Of even greater constitutional importance was the action first taken by Canada in defining within the broader circle of British subjects the narrower class of Canadian citizens. The term was first adopted for a limited purpose, that of immigration, when it was desired to make clear what persons were so connected with Canada as to be exempt from the provisions of the immigration legislation. But a wider use was rendered

[1] Dicey, *Conflict of Laws* (4th ed.), pp. 156-98.

necessary by the creation of the Permanent Court of International Justice. Under the statute of that body it is impossible for two nationals of one Power to be elected Judges; and as Canada, in virtue of its independent membership of the League of Nations, was also an independent member of the Court, it was necessary to secure that if a Canadian were elected he would not be refused a seat because a British member was already elected. Canadian nationality, therefore, is ascribed by an Act of 1921 to all Canadian citizens as defined in the Immigration Act, 1910, to their wives, and to the children of Canadian nationals born out of Canada. Under the Act of 1910 a Canadian citizen is any person born in Canada who has not become an alien, any British subject domiciled for three years in Canada, and any naturalised alien who has Canadian domicile. Analogous provision for the nationality of the Union was made by an Act of 1927; while the Irish Free State by its Constitution conferred citizenship on all persons domiciled in the Free State on the coming into force of the Constitution, if born there or in Northern Ireland or if either parent was born in Ireland, or if he had resided for seven years in the Free State. This definition was accepted without demur by the British Government, despite the fact that the Constitution introduced a most important modification of the normal rule that political rights in the Dominions are extended to all European British subjects on identic terms. Though citizens of the Irish Free State still enjoy in the rest of the Empire the rights accorded to British subjects in general, political rights in the Free State are strictly limited to citizens of the Free State by the Constitution.

II. *The Control of Native Races*

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Difficult issues have presented themselves regarding the duty owed by the British Government to native races in the colonies and the claims of colonial Legislatures to be permitted full sovereign powers of legislation over all persons within the area of their jurisdiction. Even in Canada the British Government felt bound, long after the grant of responsible government, to reserve to itself the duty of dealing with the Indian tribes with which it had concluded treaties in the earlier days of Canadian settlement, and which had co-operated with it against the attack of the United States in 1812–14. It was not until 1860 that arrangements were made for the assumption by the Dominion Government of full responsibility for the agreements already concluded. But the surrender once made was accepted as final, and the Indians of Canada have received no encouragement to press their claims through the mediation of the United Kingdom. It has been assumed that the obligations of the Crown will be fully carried out by the Government of the Dominion, and this assumption has fully been justified. The gradual transfer to the control of the Dominion and the provinces of Indian lands has been arranged by agreement, under which due provision has been made for the permanent benefit of the tribesmen.

After long quiescence and after its nature had been the subject of definitive rulings by the Privy Council, the nature of the Indian land and other rights came unexpectedly before the Assembly of the League of Nations in 1923, when the Six-Nation Indians asserted that they were an independent tribe, not under British

sovereignty but merely allied. It was then made clear that the position of the Indians in Canada, as in the United States,[1] had never been assimilated to that of sovereign States in international law. The Indians were regarded as having a mere right of usufruct in their lands, which could be acquired in sovereignty by the European settlers by right of conquest or occupation or usage; and agreements made by the Crown, whether through the British Government or the Canadian Government, are not treaties under international law, but matters of purely domestic concern to Canada.

In the case of Australia, the feeble aborigines received hard treatment at the hands of the early settlers, and the efforts of the local Governments to secure them some measure of comfort were largely vain. In the Constitution Acts of 1855–6 no reservation of Imperial authority was deemed either possible or desirable, and the question became only of interest in the case of Western Australia, in which the aborigines were more numerous and less easily subdued. It was impossible, during the period of Crown Colony government, to regard the position of the natives as satisfactory; and when responsible government was conceded, it was felt essential to leave in the hands of the Governor control of the department charged with their interests, and to assign him a sum of £5000 annually for their benefit. It was not surprising that this limitation of authority was resented by Ministers, and that it proved impossible for the Governor to effect much for those thus entrusted to his charge with the limited funds available. In 1897, therefore, at the Colonial Conference, Sir John Forrest's arguments prevailed with Mr. Chamberlain, and the

[1] Wheaton, *International Law* (6th ed.), i. 101.

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control of the aborigines passed wholly to the Ministry, which has certainly worked more efficaciously in their interests, despite the grave difficulties of the task.

In New Zealand, also, the attempt was made to concede responsible government in other matters, while reserving control of native affairs. The faith of the Crown was, of course, involved by the terms of the treaty of Waitangi of 1840, under which sovereignty was ceded by the chiefs, subject to the retention of their land rights. As land acquisition from the natives was the most pressing problem of New Zealand government, it is not surprising that the effort to separate control of native affairs from general administration was doomed to break down, and the British Government assented readily to the proposal of Sir George Grey that the charge of native affairs should be handed over to Ministers. Unhappily, the change was attended by unsatisfactory consequences, involving the colony in the long-drawn-out Maori wars which came to an end only in 1871, while unrest flared up again in 1880–81. There is no doubt that both under the Imperial and the colonial régimes the acquisition of land was often carried out by unwise means,[1] and in special the policy of confiscation of land for rebellion was open to serious censure, for many loyal natives suffered with the guilty, and the confiscations often alienated natives who had no desire to rebel and drove them to war. Happily, in the long run better counsels prevailed. In 1888 the Maoris determined to settle down in peace and amity with the Europeans, and in 1923–9 steps were taken by the Government of New Zealand to make tardy but

[1] See W. Pember Reeves, *The Long White Cloud* (3rd ed.), pp. 189-226.

not ungenerous compensation for lands taken from the Maoris without just payment or unfairly confiscated in the war period. It cannot be denied that the policy adopted towards the Maoris from 1864 to 1869 caused a severe strain in the relations between the United Kingdom and New Zealand; but the Imperial Government thereafter withdrew entirely from any intervention in the policy of the colonial Administrations—insisting, in reply to representations from the Maoris, that the King had charged his Ministers in the Dominion with care for their interests, and that therefore on any matters which concerned them they must address the New Zealand Government. Nor can there be any doubt of the wisdom of this relinquishment of sovereignty on the part of the Imperial Government.

Even more difficult was the position of the British Government in South Africa. Beyond the limits of the Cape Colony and of Natal the Crown was connected in varying ways with native tribes, and its native policy was rendered more complex by its relations with the Orange Free State and the Transvaal. As regards the Cape proper, the problem was partially solved by the statesmanship which coupled the grant of representative institutions in 1853 with the concession to the natives of the franchise. With this safeguard it was possible to concede responsible government in 1872 without inserting special clauses to secure native rights. In Natal, on the other hand, the natives were denied the franchise save on almost impossible conditions, and their overwhelming numbers presented exceptional difficulties. It was indeed obvious[1] that the colony was

[1] E. Walker, *History of South Africa*, p. 525; Report of Natal Native Affairs Commission, 1907.

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not ripe for self-government; but, after hesitation, not less on the part of its people than of the Imperial Government, responsibility was conceded in 1893, with the reservation of a vague sphere of authority to the Governor as supreme chief. In this capacity he was not to be bound to act on ministerial advice, and certain funds were rendered available to him beyond Parliamentary control. So also, when responsible government was accorded in 1906 and 1907 to the Transvaal and the Orange Free State, a vague power was reserved to the Governor as paramount chief. Needless to say, all these efforts to isolate one element of governmental activity and to hand it over to the independent control of the Governor were doomed to failure. The Governor's position gave him no real authority, while in Natal it may have diminished the sense of responsibility of Ministers, whose failure to face difficulties led to prolonged native unrest in 1906–8 and elicited a report to the local Parliament which is a convincing indictment of complete mismanagement.

In view of these facts, it was clear that no useful purpose could have been served by attempting to reserve any measure of control over native affairs to the Governor-General when the colonies were formed into the Union. Reliance was placed, instead, in the fact that native affairs would now come under central control instead of being dealt with by the several colonies without any well-defined general policy. At the same time an effort was made to indicate the Imperial view of the needs of native territories by laying down formally the principles which, in the opinion of the Imperial Government, would have to be applied to the native territories

which remained under Imperial control in the event of their transfer to the administration of the Union. The essence of these suggestions is the imposition of the charge of administration on the Prime Minister himself, thus ensuring that native affairs shall be regarded as of fundamental importance and as deserving the personal attention of the chief Minister of the Crown. Further, it is proposed that he should be required to consult in matters of administration or legislation a permanent Commission, and that, if its advice is overruled by the Governor-General in Council, the Commission may normally insist on its views being laid before Parliament. It is clear that a serious question arises as to the validity of the transfer of control of the territories, Basutoland, the Bechuanaland Protectorate, and Swaziland, to the control of the Union, for these territories were originally in direct relations with the Crown in the United Kingdom, acting through the High Commissioner in South Africa. Their inhabitants, therefore, have a right to rely on treatment in harmony with the traditional British policy of trusteeship for the native races, and they cannot be expected to acquiesce in any action which would transfer their lands to the control of the Union, if the Union policy of racial supremacy and postponement of native to European interests were to be held applicable. Hence the transfer of the territories which was originally expected to follow shortly on union has been postponed. There is an obvious analogy between the position as regards these territories and the claim of the rulers of the Indian States that they cannot be made subject, without their consent, to the control of a responsible Government in India, in lieu of that of the King exercised through the Governor-General,

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responsible to the Secretary of State for India and to the Imperial Parliament.[1]

On the other hand, the British Government has in no way endeavoured to intervene in the native policy of the Union of South Africa since the creation of the Union. While much of that policy has been based on sound principles, there are two vital matters on which, under the older conception of Imperial relations, protests by the Imperial Government might have been expected: the proposals of the Union Government as to segregation of the natives as regards holding of lands, and the imposition by legislation in 1926 of the rule of a colour bar, under which natives are denied the possibility of obtaining employment in a large number of skilled industries, and are thus cut off from progress in industry at the same time as the limited amount of land placed at their disposal prevents any chance of their development on the lines of agriculture. This policy, which has been adopted on the plea of the paramount importance of the preservation of the European race in the Union, runs counter to the established British policy in regard to native races, which forbids their reduction to mere means for furthering European welfare; and but for the grant of responsible government, the British Government would doubtless have been expected to take action in the direction of securing better conditions of possible progress for the native race. It must be remembered also that the policy of making civilisation (as opposed to colour) the test, in matters not merely of economic but political treatment, was at one time definitely adopted by no less a man than Cecil Rhodes; nor need we suppose that his demand for equal rights

[1] Keith, *Journal of Comparative Legislation*, 1928, pp. 301, 302.

for every civilised man south of the Zambesi was merely adopted as a means of influencing opinion against the doctrine of white supremacy adopted by the two Boer Republics. But the issues are essentially domestic, and the newly acquired sovereignty of the Union renders it improper for the British Government, even by suggestion, to intervene on behalf of any section of the population subject to Union jurisdiction. That it may render it difficult to increase that area is another and wholly different question.

Not even the determination of the Government of General Hertzog to abolish the native vote in the Cape Province has evoked any protest from the Imperial Government, despite the peculiar circumstances affecting that vote. Under the provisions of the South Africa Act, 1909, the Cape vote was safeguarded by the provision that it could be abolished only by a Bill passed through a joint session of the two Houses of Parliament and by the votes of not less than two-thirds of the members of both Houses. This safeguard, however, was questioned as inadequate during the passage of the Bill through the Imperial Parliament, and a definite promise was given, and duly kept, that in the Royal instructions to the Governor-General there should be inserted a clause requiring specially reservation of any such Bill for the consideration of the Crown. In place of the vote now enjoyed by Cape natives, the proposals of General Hertzog, which failed in February 1929 to receive the requisite majority in the joint session of Parliament held in accordance with the Constitution, involved the principle of the representation of the natives throughout the Union—and not in the Cape alone—by special representatives, who must be Europeans elected by the

natives, but who will be authorised to deal also with issues other than those affecting the natives. This arrangement, however, failed to elicit any satisfaction from the native voters, who, in the Cape, felt that they possessed far greater power to influence legislation in their favour by the possession of the vote in its existing form than they would have through the presence in Parliament of a special class of representatives—who would in all likelihood exercise a very feeble influence on legislation, and whose anomalous position would be a source of constitutional difficulty.[1]

III. *The Control of Immigration*

The early days of responsible government raised no issues of importance regarding immigration into the colonies, whose need for population prevented them from being critical of the quality of the new-comers. But the federation of Australia led to the adoption of an Act in 1901 to regulate immigration, which soon won undesirable publicity in England because of the unfortunate case of the English hatters who found themselves denied admission on the score that they came out under contract of service in Australia. It was clear that the best immigrants are often those who go out to assured work, and the episode savoured too much of a policy of exclusion of competition to be favourably viewed. The Imperial Government, however, steadily maintained that no question of intervention could arise, and the difficulty was in fact surmounted, while in later legislation care has been taken to leave it open to the Executive to facilitate the entry of all desirable emi-

[1] E. H. Brookes, *History of Native Policy in South Africa* (1927).

grants from the United Kingdom. In Canada also the powers of the Government to exclude British subjects were increased by legislation in 1910, and distinct annoyance was raised in many quarters in the United Kingdom by the Canadian policy of deporting those immigrants who within three years of their landing became charges on the public. It was felt that the Dominion profited so much by immigration that expulsion in these cases, often in circumstances of honest and temporary misfortune, was open to grave exception on grounds of fairness and Imperial sentiment. Officially no action was taken by the British Government, but the influence of the Duke of Connaught, the most constitutional of Governors-General, was properly cast in favour of a sane and generous enforcement of the law, which has, however, continued in operation. It was strengthened in post-war conditions to confer on the Executive wider powers of removal of persons guilty of fomenting disorder in the Dominion, but the powers taken in 1919 have since been modified. The one constitutional issue involved was that of the legal power of the Dominion Parliament to authorise the expulsion of persons from its territory, in view of the territorial limitation of Dominion legislative power. But this right was recognised by the Privy Council in 1906, in the case of Cain,[1] to be inherent in the measure of sovereignty possessed by the Dominion; and it is now clear that the shipmaster who conveys to England any person deported under the authority of a Dominion Parliament may rely on his action being upheld, if questioned in a British Court.

The British Government, however, was much more

[1] *Attorney-General for Canada* v. *Cain and Gilhula*, [1906] A.C. 542.

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immediately affected by the remarkable step taken by the Government of the Union of South Africa in January 1914, when it deported,[1] without legal authority, from Natal, ten persons alleged to have been ringleaders of the grave industrial unrest which was only suppressed by the declaration of martial law and the massing of forces. The action taken was the more difficult of defence because, as General Smuts admitted in Parliament, it was most improbable that Parliament, had it been consulted, would have consented to so drastic a step, no evidence having been laid before any Court of the guilt of the deportees. The British Government was confronted with a situation which, if the deportees had been expelled from a foreign country, would have compelled it to protest. It is true that each country has the right to remove aliens from its territories, but the right must be used with reasonable circumspection and propriety, both of which requisites were plainly lacking in this case. But no effort was made to intervene, though the opportunity was presented by the necessity of the Royal assent to the Indemnity Bill hastily passed through the Union Parliament. Assent, however, was not refused, but the suggestion was made that, in the event of the two Governments being unable to agree, after investigation of the individual cases, as to the justice of their deportation, the issue might be referred to the Privy Council for its opinion—an interesting proposal, action on which became unnecessary by reason of the subsequent policy of the Union Government in permitting the return of the deported men. Since then, however, deportation for seditious offences has become a common provision in Dominion Acts without protest

[1] Keith, *Imperial Unity and the Dominions*, pp. 131, 132, 160-67.

from the British Government, and such limits as have been imposed in the Commonwealth, as in the famous cases of Johnson and Walsh in 1925,[1] rest on the High Court's restrictive interpretation of the Constitution and not on Imperial objections. Nor has the British Government secured from the Dominions by agreement the somewhat obvious desideratum that persons who are assisted to immigrate into these Dominions at the expense of the British taxpayers under the scheme of Empire-assisted migration should be exempt from deportation on the ground of failure to establish themselves. Common-sense seems to dictate that the Dominions which profit by this expenditure should share the loss when an immigrant fails to make good.

The generous acknowledgment by the British Government of the right of the Dominions to decide the composition of their own population, and, if they desire, to exclude or deport British subjects from the United Kingdom, explains the position which has consistently been adopted as regards the immigration of British Indian subjects into the Dominions. The ideal of the existence of absolute freedom of locomotion and settlement within the Empire runs absolutely counter to the economic interests of the white population of all those territories which offer a climate attractive to natives of India. Allowing for exaggeration, it is none the less clear that if Indians settled in numbers in British Columbia or in many parts of Australia, it would be impossible for the white settlers to compete economically with them. The profound divergence in views and habits between Indians and Europeans is

[1] *Ex parte Walsh and Johnson*, 37 C.L.R. 36; Keith, *Journal of Comparative Legislation*, 1926, pp. 133-5.

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also a factor of first-class importance, and it is easy to understand the emergence of the policy of a White Australia, which is directed impartially against British Indians, Chinese, and Japanese, and the fixed purpose of the people of British Columbia to secure, if they can, the disappearance as a serious factor in their population of these three races. New Zealand, with its peculiarly British and homogeneous population, is an enthusiastic adherent of the doctrine of exclusion; while in the case of South Africa, it is legitimately enough claimed that the appalling difficulties of the native question should not be accentuated by the presence of a large Indian population, which can amalgamate neither with the Europeans nor the natives.

Early Australasian measures were aimed against Chinese, and as the treaties in force did not confer on Chinese any treaty right to enter the British Dominions, the Imperial Government was not in a position to take serious exception to the principle of exclusion of a race which, in any case, desired only temporary work outside China. But the expression of the intention of the colonies in 1896 to apply their anti-Chinese legislation to all Asiatics, including Indians, created a new position, and Mr. Chamberlain took up the matter seriously with the Prime Ministers of the colonies at the Colonial Conference of 1897. There emerged from this discussion the rule that the Imperial Government would not take exception to legislation which excluded persons of Asiatic race by tests not avowedly racial. The chief test thus employed was that of a dictation test, which could be manipulated by the officer administering it to ensure the refusal of admission to any Asiatic applicant. In this way, under the

immigration legislation of the Commonwealth, Indians have been successfully excluded, and the same fate has been meted out to Chinese and Japanese. New Zealand, after making use of a like test, decided in 1920 to adopt the more direct method of refusing admission to any persons without special permission, which is not granted to Asiatic applicants. In Canada matters were complicated by the reluctance of the federal Government to antagonise Japan by a too drastic refusal of admission, but legislation was adopted which effectively barred entrance to Indians; while negotiations with Japan limited, at first to 400 and now to 150,[1] the total number of fresh immigrants annually. With some reluctance, in view of the differentiation between Indians and Japanese, the Imperial Government refrained from protest. These events had an unhappy sequel: revolutionaries in India and others conspired to send a shipload of Sikhs to Canada, and when they were refused entrance they returned to India to spread sedition there.

While the British Government thus acquiesced in the doctrine of the right of the Dominions to determine the racial composition of their populations, it felt entitled to take exception to the policy of denying those persons who were lawfully resident in the Dominions the ordinary rights of citizens. The protests of the Government induced a certain degree of caution in the Australian States, which had begun, especially in Factory Acts, to impose disabilities on Asiatics as such. A more decided step was taken in 1910, when a reserved Bill of the New Zealand Parliament, which

[1] See Mr. Mackenzie King's statement in the Canadian House of Commons, June 8, 1928.

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was intended to make impossible the employment of Asiatics on merchant shipping trading with New Zealand, was never allowed to become operative. This action was followed up at the Imperial Conference of 1911 by a striking appeal from Lord Crewe in favour of the concession to resident Indians of full civil and political rights. The services rendered by India during the war, to the common cause, were reflected in the formal resolutions of the Imperial Conferences of 1917 and 1918, which recognised in the case of India as well as of the Dominions the right to regulate immigration at pleasure, subject to the principle that visits for pleasure, business (as opposed to labour), or education should be furthered and facilitated. It was also agreed that just treatment should be extended to Indians lawfully domiciled, and the same principle was repeated at the Conferences of 1921 and 1923. The results of these resolutions have been somewhat meagre, and have done little to lessen Indian resentment, which has taken the form of certain differentiations against Dominion British subjects in Indian legislation. But the attitude of the British Government has at least made it clear that it concedes in this question the fullest sovereign powers to the Dominions.

In the case of the Union of South Africa the British Government was placed in a much more delicate position. The Indian population in Natal had been deliberately imported by the desire of the people of Natal, and had established there the sugar industry. The Cape, on the other hand, presented no problem, for Indians there were negligible in numbers. On the other hand, there was a large Indian element in the Transvaal, and before the Boer war the British Government

had taken up a most emphatic attitude on the iniquitous character of the disabilities imposed on Indians by the legislation of the State in 1885, which denied them the right to own landed property and compelled them to reside in locations. After the conquest of the Transvaal the British attitude underwent a complete change, and the local Government pressed for the exclusion of further immigration and the rigid enforcement of the republican laws, which the prevailing laxness of the Boer administration had failed to make effective. There was some demur to such a complete *volte-face*, but the concession of responsible government afforded Lord Elgin the necessary excuse for a change of policy, and the Transvaal was permitted in 1907 to pass an Act of virtual exclusion. Moreover, very drastic measures were adopted to remove from the colony persons suspected to have entered illegally, and control by the courts was evaded by deporting the suspects over the Portuguese border with the assistance of the Mozambique Government. In the Orange River Colony the pre-war exclusion of Indians saved the Government from a difficult problem.

The advent of the Union seemed to promise a more favourable treatment of Indians, as the control of matters affecting them was handed over by the Constitution to the central Government, which was expected to show a greater measure of consideration than had been evinced in the attitude of the colonies. This hope was disappointed, though the situation was simplified by the determination of the Government of India that from July 1, 1911, Indian indentured immigration into Natal should cease, as it was obvious that the people of Natal did not desire the permanent

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settlement of the immigrants. A visit of the Indian patriot, Mr. Gokhale, to the Union, and the pressure exercised by Lord Crewe, resulted in the passing of an Act in 1913 which was intended to prevent absolutely immigration but to meet some of the minor grievances of the Indians. Its object, however, was by no means achieved, and Mr. Gandhi, who had now taken up the cause of his countrymen, inaugurated a policy of passive resistance, which the Government had to repress by force. Happily, terms were arranged as the result of the enquiries of a Commission, and minor concessions to Indians, chiefly in the direction of allowing the entry into the Union of one wife and children for Indians lawfully domiciled, removed some of the bitterness. The respite, however, was brief. It soon proved that the Indians were the objects of a widespread policy which aimed at denying them the power to earn their living by their favourite and profitable methods of petty trade. Advantage was taken of the control of the grant of licences to trade, by municipal authorities in Natal, to circumscribe their operations; while their residence in those parts of the Transvaal where they could best carry on business was held to be illegal under the Gold Law, 1908, and other enactments. In vain were efforts made at the Imperial Conference of 1921 to secure the acceptance by General Smuts of the doctrine of civil rights for domiciled Indians; he dissented from the resolution to that effect accepted by the other Dominions, and in the renewal of the discussion at the Conference of 1923 he reiterated his protest against any resolution being adopted by the Conference save when there was unanimity. In pursuance of his policy of repression, he pro-

posed, in 1924, to legislate to restrict the rights of Indians, both as to residence and trade, to certain defined areas, thus meeting the demand of Natal that they should be excluded from all the attractive lands. His fall from power was followed by the determination of General Hertzog to persevere in the same policy, and to add to it the Colour Bar Bill, which was aimed against Indian skilled labour no less than against native skilled labour. The latter measure became law in 1926, but the passing of the former was averted by a conference between representatives of the Governments of the Union and of India, which met at the close of 1926 and reached agreement in January 1927. Under this concord[1] those Indians alone in South Africa can expect to be encouraged to settle permanently who aim at achieving European standards of life. For those with this aspiration, aid in rising in the scale of civilisation is to be provided. All others are to be encouraged to emigrate to India, where they will be received and aided to establish themselves in their new home by the Government of India. Persons who thus leave South Africa will lose their domicile there in three years and become prohibited immigrants, while those who have received aid to emigrate to India from the Union Government will be allowed to return within the three-year period only on condition of refunding the sum paid for their transport. The success of the plan is still in doubt, for it assumes that there will be a very large emigration from South Africa, and it must be remembered that the majority of those who are expected to emigrate have been born or brought up in the Union and have no Indian homes

[1] *The Round Table*, xvii. 627-32.

and very slight connexion with India. From the point of view of Imperial relations, the dominant fact is that the British Government was vigilant in making it clear that, on the one hand, it did not question the sovereign authority of the Union to deal with British Indians, but, on the other hand, it was entitled to ask the Union to bear in mind the serious effect on Indian opinion of any treatment which could be deemed inequitable meted out to Indians settled in a British Dominion. Nor is there any doubt that the settlement, such as it is, would have been impossible but for the desire of the Union to display its sense of Imperial solidarity.

In India, however, throughout the period of friction with the Union and other Dominions, the view was freely expressed that the British Government was failing in its duty to His Majesty's Indian subjects, and that it should have secured for them free entry into the Dominions. It is clear that had the British Government attempted to secure this end, it must have been prepared to face the break-up of the Empire; and that, even under the fullest responsible government, India could not expect to obtain from the Dominions a concession denied to Japan. Doubtless in the earlier days of the South African issue there were grave errors in British policy, and the contrast between the denunciations of Boer intolerance and the adoption in the Transvaal under British control of a still more repressive system is painful. On the other hand, it must be noted that the policy of the Indians who remain in South Africa has been framed without consideration for native interests, in accordance with the advice of Srinivas Shastri, the first representative of the Indian

Government appointed to act as intermediary in regard to the interests of the Indians. He has advised his fellow-countrymen to refuse to make common cause with the native movement for the grant of civil and political rights, though it is clear that the natives' claim in these respects is as legitimate as that of the Indians themselves. Racial exclusiveness is not particular to Europeans.

One other problem in connexion with immigration arose in Queensland which caused concern to the British Government. Into that colony, before federation, had been introduced a considerable number of Kanakas from the Pacific Islands, who were then thought to be indispensable if the sugar industry were to be carried on. But the Kanakas shared the growing unpopularity of non-white races, and on federation being accomplished it was the deliberate policy of the federal Government to secure their repatriation. The problem concerned the Imperial Government, for the recruiting had taken place in part from islands under its jurisdiction, and it was concerned with the possible ill effects of repatriation. Those natives who had long since left their homes might often be received with hostility, and tribal conflicts were only too probable. The Aborigines' Protection Society called attention to the harshness of the proposed deportations, and the federal Government secured in 1906 from Parliament an amendment of the original measure of 1901 which permitted the permanent residence in Australia of those who had by long residence established themselves effectively in the Commonwealth. The sugar industry thus was largely left to European workers, Italians in special being introduced in considerable

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numbers, with successful results, so that in 1913 by a combination of federal and State legislation non-Europeans were excluded effectively from any share in the industry. The price, of course, for this elimination of native labour has been high; the industry exists under the stimulus of bounties, for which the consumer pays in the cost of this necessity of life. Throughout, the position adopted by the Imperial Government was clear: it claimed no right to interfere save by way of inviting the attention of the Commonwealth Government to the interest which it had in the matter in view of the proposal to repatriate the islanders to territories under its jurisdiction. Strictly speaking, of course, it could have forbidden such action, without impinging on the sphere of the Commonwealth, but relying merely on its power to control entrance into the islands under its government; but no proposal to adopt this policy was even made.

CHAPTER IV

STATUS AND CIVIL RIGHTS

I. *The Regulation of Status*

It was long before the conception gained ground that matters of status were essentially of local concern and not to be made the subject of Imperial control. The prevalence of the older view is still visible in the rule which enjoins the Governors of the Australian States and of Newfoundland to reserve Bills which deal with divorce. The development of more advanced ideas on this subject in the Australasian colonies was regarded with misgiving in England, and in 1887 a New South Wales Bill was objected to, on the ground that it was most desirable that there should be uniformity in the law of divorce throughout Australia, and that, as it did not adhere to the rule that domicile is the only ground permitting exercise of divorce jurisdiction, there would arise cases in which persons duly divorced in the colony would be regarded as still married in the United Kingdom and would be guilty of bigamy if they re-married, while their innocent offspring would be illegitimate. Two years later Victoria produced the first really advanced Divorce Bill. It added largely to the grounds of divorce, permitting it in case of drunken-

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ness, accompanied by cruelty or failure to support on the part of the husband or neglect of domestic duties on the part of the wife; of desertion for three years; of a commuted death sentence or sentence of seven years' penal servitude; of murderous assault, and of repeated adultery by the husband. This list of extensions beyond the narrow English rules was mitigated in the eyes of the Colonial Secretary by the fact that divorce jurisdiction was to rest on domicile, save in the case of the deserted wife, whose right to a divorce was not to be defeated by the deserter's change of domicile. Moreover, the representations of Victoria in favour of the Bill being allowed effect were strengthened by similar views expressed by the other States, and the Imperial Government decided to waive its objections. Since then there has been no objection raised to further extensions of the grounds of divorce, such as have gradually spread in the Australian States, and the divorce virtually by mutual consent with which New Zealand has experimented has not been criticised. Even the unfortunate practice of permitting divorces where the spouses are no longer domiciled has been passed over without comment, though the strict insistence on the rule of domicile by English courts renders it clear that divorces granted otherwise than by the court of the domicile are utterly invalid. The issue was finally disposed of by the Privy Council in the Canadian case of *Attorney-General for Alberta* v. *Cook*;[1] and, curiously enough, while by Imperial legislation in 1926 power is given to permit the divorce by Indian or colonial courts of persons domiciled in

[1] [1926] A.C. 444. See A. V. Dicey, *Conflict of Laws* (4th ed.), pp. 285-288, 818-26, 873-96.

England but resident in these territories, the Act does not permit similar action by Dominion courts.

As in the case of divorce, there was long reluctance on the part of the Imperial Government to sanction legislation which varied the laws of marriage by allowing unions between persons whose marriage was forbidden by English law. The grounds for this reluctance were obvious enough: the offspring of such marriages would be in an ambiguous position in England, even if the marriages themselves offered little that was seriously offensive. In vain for a long time did South Australia endeavour to have marriage with a deceased wife's sister permitted; the concession was not made until 1871, whereupon the practice spread over the rest of Australia, and was adopted by New Zealand in 1880 and by Canada in 1882; eight years later the sensible course of permitting marriage with a deceased wife's niece was adopted there. It was left to New Zealand in 1900 to allow marriage with a deceased husband's brother, a permission widely followed; while the relation was extended to a nephew in 1923 by Canada. Though these concessions were made, the British Government was long adamant as regards the position of the offspring of marriages with a deceased wife's sister. The children were, indeed, legitimate if the parents were domiciled in the colony, but they were debarred from inheriting English land or a title of honour; if the parents were not so domiciled, the children were illegitimate. To remedy this unsatisfactory position, an appeal for Imperial legislation was made by the Agents-General of the colonies in London in 1896; it was reiterated by the colonial Premiers at the Conference of 1897, and the Commonwealth

Government urged legislation in 1904 and won the support of the veteran Lord James of Hereford. But it was not until 1906 that the Liberal Government passed an Act which removed the disabilities attending such marriages in the colonies; while in the following year, partly as the natural sequel of this Act, the step was taken of rendering such marriages valid in the United Kingdom.

II. *The Regulation of Land and Civil Rights*

Lord Durham, acting under the advice of E. Gibbon Wakefield and Arthur Buller, suggested in his famous report that the Imperial Government should assume the function of taking charge of the waste lands of Canada and should arrange for their settlement on the principles laid down by Wakefield. It must be remembered that his report was produced under circumstances of great difficulty and stress, a fact which may explain how he came to put forward a proposal which ran counter to the commitments already entered into by the British Government towards the several provinces. The assumption of control could not have been carried out save by retracting assurances, repeatedly given, that if the provinces would give adequate Civil Lists they would receive full control of the Crown lands. But, apart from this objection, it is clear that it would have been a hopeless task to endeavour to direct from England the process of land settlement, while the growth of colonial life would have been retarded by the divorce from the control of the colony of so vital an element in its life.

How little the arguments of Wakefield[1] carried conviction is shown by the policy followed in New Zealand and Australia: in both these cases the experiment urged by Wakefield could have been tried, but in both it was decided, with responsible government, to hand over the control of Crown lands. The issue was revived when the question of conceding responsible government to Western Australia was under discussion. By that time the idea, patronised by Disraeli, had become current that it was a fundamental error, in the early policy towards the colonies, that the Imperial Government had not reserved control of the lands on the score that they belonged to the Empire and were not properly to be disposed of according to the narrow interests of the small numbers of settlers. But, when the issue was impartially examined by a Parliamentary Committee and the whole case for and against retention of control of the lands was weighed, the conclusion was in favour of the old policy of entrusting the control of the lands unhesitatingly to the responsible Government on its creation. Even when the special circumstances in which settlers had been invited to resort to the Transvaal and the Orange River Colony under Crown Colony government compelled an effort to be made on their behalf, the reservation made in their interests was purely temporary, intended to tide over the unfortunate settlers until they could have a fair opportunity of permanently establishing themselves under difficult conditions. In lieu of the idea of Imperial control, there has been substituted under the Empire settlement scheme the conception of Imperial co-

[1] See R. C. Mills, *The Colonization of Australia* (1915); S. H. Roberts, *History of Australian Land Settlement* (1924).

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operation by means of grants to further development in the Dominions, on the understanding that British immigration shall also thus be furthered. The difficulties even of so advantageous a form of co-operation have been remarkably great. The offer of aid has been rejected outright by the Union and New Zealand, and it has proved impossible in the case of Australia to make any very satisfactory progress with the work of settlement, nor has it been possible to use more than a fraction of the sum of £3,000,000 a year which the Imperial Parliament was prepared to allow for this purpose.[1] The evidence of the difficulties of co-operation even in such favourable conditions is eloquent of the gravity of the error which would have been made had the design of retention of control of the Crown lands been persisted in.

The powers of the colonies in matters of regulation of civil rights have also received generous acknowledgment, even in the very important and delicate set of cases in which colonial legislation may be deemed to bear with undue severity on persons not resident in the area. From the earliest days of control of colonial legislation it was necessary to insert clauses in the instructions to the Governors to prevent assent to Bills aimed at non-residents, and this point has been raised not infrequently since the grant of responsible government. It is important to note that the attitude of the Imperial Government has deprecated intervention on this score. As early as 1874 it adopted the attitude that it would not interfere with Canadian legislation affecting marine telegraphs, despite the allegation of the Anglo-American Company that its rights were being

[1] See the Annual Reports of the Overseas Settlement Committee.

unjustly infringed; and in 1898 the whole question of intervention in local matters, even when affecting non-residents, was elaborately dealt with by Mr. Chamberlain, when he refused to defeat the determination of the Newfoundland Government to transfer to a private firm, for very inadequate consideration, a very large proportion of the assets of the colony. Feeling in the colony ran high, but the Secretary of State ruled unimpeachably that the grant of self-government carried with it the authority to decide on such issues. He admitted that "if it was seriously alleged that the Act involved a breach of faith or the confiscation of the rights of absent persons, Her Majesty's Government would have to examine it carefully and consider whether the discredit which such action on the part of a colony would entail on the rest of the Empire rendered it necessary for them to intervene". The circumstances, however, negatived any such occasion for intervention, and it was no part of the duty of the Crown to refuse operation to an Act which was passed by an overwhelming majority of the Assembly, even though the proposal had not been submitted to the people at the general election and a petition against it, alleged to have been signed by more than half the registered electors, had been sent to England.[1] In the same spirit a refusal was returned to the request that New South Wales land legislation of 1908 extinguishing certain disputed titles should be refused operation, or the earnest requests from English owners of Australian land that the Commonwealth legislation of 1910 which was aimed at breaking up the large estates should be

[1] *Selected Speeches and Documents on British Colonial Policy*, ii. 105-108.

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disallowed, as unjustly differentiating against non-resident landlords.

An even more striking case of refusal to intervene was seen in 1920, when the Queensland Parliament passed two Acts of a confiscatory character. This remarkable legislation was only secured through the device of swamping the nominated upper house, a process carried out by an ex-Labour Minister who had been rather absurdly appointed as Lieutenant-Governor and was at the time acting as Governor in the latter's absence. One of these Acts repealed the assurances given to tenants of the Crown that on the periodic appraisement of rents of pastoral leases or grazing licences the limit of increase would be 50 per cent. The second Act provided for the acquisition, on unjust terms, of the business of the Brisbane Tramways Company. The irregular mode in which the passage of these measures had been carried through, and the unfair nature of their substance, would have afforded just grounds for Imperial intervention. It was not, indeed, seriously suggested that the Acts should be simply disallowed, but I suggested that the Imperial Government might properly ask the Queensland Government to submit the question of the equity of these Acts to impartial arbitration—for instance, by the Privy Council under a special reference. The plan, however, was rejected by Mr. Theodore, the Premier, and the Secretary of State finally refused to intervene.[1] The City of London, however, was able to protect the interests of the pastoral tenants—largely London financed or controlled—and the Tramway Company: for Mr. Theodore found that the money market was

[1] See Keith, *War Government of the British Dominions*, pp. 258-61.

closed to Queensland loans until he came to a just settlement with the two bodies. He did not yield at the moment, but his effort to find another source of loans was only moderately successful, and in due course the matter was adjusted. Fair terms were conceded to the tenants and the Company was expropriated on less inequitable conditions, whereupon the City again consented to raise Queensland loans. Happily, this incident is isolated, though in the case of the Canadian provinces certain instances have occurred of interference with property rights, which have been denounced by Canadian Judges in terms more vigorous than a non-Canadian would care to use. Thus, in a famous controversy in 1909, Mr. Justice Riddell, of Ontario, observed:[1] "The proposition, 'Thou shalt not steal', has no legal validity upon the sovereign body." In such cases, also, the Federal Government of Canada, which has the power of disallowing provincial Acts, adopts the principles applied by the British Government to Dominion Acts. Nothing save the gravest necessity would induce the strong step of disallowance. The Dominion thus respects the sovereignty of the provinces on the same principle as its own sovereignty is admitted by the United Kingdom. In the rather bitter disputes between the Canadian Government and certain holders of railway securities whose rights have been alleged to have been unfairly dealt with by Dominion legislation, there has been no suggestion that the British Government had any *locus standi* to intervene authoritatively on behalf of the British holders.

Curiously enough, in the sphere of literary property an exception was long maintained to the unfettered

[1] 19 Ont. L.R. 275, 279.

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power of the Dominion to regulate its own internal affairs. Almost at the outset of responsible government an Imperial Act of 1842 provided a system of copyright under which works published in the United Kingdom enjoyed copyright also in British colonies, and the import of reprints was prohibited. The Act was unworkable in Canada, in view of the American practice of reprinting popular works and the impossibility of effectively checking import, and representations were duly made to the Imperial Government. In 1847, therefore, due provision was made for the suspension by Order in Council of the prohibition of imports in case where provision was made for a due revenue to the author. The arrangement was duly carried out, but with little satisfaction to Canada, whose printers obtained no work on reprinting of standard books, while the authors derived very little profit from the duties on importation imposed. As early as 1869, therefore, the Canadian Government raised the question of the concession to Canadian printers of the right to reprint on payment of a royalty of $12\frac{1}{2}$ per cent; but the British Government demurred, and when a Bill was duly passed by the Dominion Parliament in 1872 to secure the right to reprint, it was not permitted to become operative. All that was allowed was the passing of an Act in 1875 to provide for the grant of a Canadian copyright to those authors who printed and published or reprinted and republished in the Dominion; in that case the importation of foreign reprints was absolutely forbidden. This system was, therefore, purely additional to the Imperial copyright, conferred in respect of publication in the United Kingdom under the Act of 1842, and in respect of works published in foreign countries

between which and the United Kingdom there were Copyright Conventions by Acts of 1842, 1852, and 1875.

So far the Canadian Government had not treated the matter very seriously, but it assumed a new aspect after the conclusion of the Berne Conference of 1886, under which an international copyright system became operative. The Convention was made applicable to the colonies only with their assent, and power was reserved for any colony to withdraw from it separately; nor can there be any doubt that it was assumed by Canada, in accepting the Convention, that her power to withdraw was unfettered. The Convention was carried out by an Imperial Act, and by an Order in Council under it, of November 28, 1887, was made applicable to Canada. Under it, publication in the United Kingdom conferred copyright throughout the Empire, as did also publication in any foreign country which accepted the Convention. In a short time the unsatisfactory character of the position became obvious to Canadian printers, and by their efforts an Act was passed in Canada in 1889, which, however, was not to become operative until proclaimed by the Governor-General. This Act offered copyright in Canada on condition of printing there; if this offer were rejected, licences could be issued for reprinting works produced elsewhere, on payment of a royalty of 10 per cent; in this event, the importation of all other copies of the work could be forbidden, save in the case of copyright books printed and published in the United Kingdom. This policy, of course, necessitated withdrawal from the Convention and the modification of the Act of 1842 regarding copyright in the United Kingdom, under which mere publication there gave

Imperial copyright. The British Government declined to assent to the Act, on no better ground than that British publishers held that the time available for obtaining copyright was too short and that the licence system was objectionable. The motive, of course, prompting this denial of Dominion authority was the desire to secure from the United States, the happy home of pirated literature, a measure of copyright protection. This was achieved in 1891, but on most onerous terms. Under the agreement then reached, copyright was conceded to British subjects in the United States, but only if the works were printed there (thus ensuring profitable employment for American printers), while in return American citizens were assured of copyright throughout the Empire on mere formal publication in the United Kingdom. The Canadian Government by this time had realised the injustice of this restraint on the sovereign authority of the Dominion, and strong remonstrances elicited the appointment of a departmental Committee, representing the Foreign and Colonial Offices and the Board of Trade. The report of this body is curious; it showed no appreciation whatever of the constitutional issue, but is concerned wholly with British as opposed to Canadian interests. The arrangement with the United States might be terminated by that Power if the Canadian market were lost to American printers and publishers; the British author would lose his automatic copyright in the Dominion; British policy was in favour of making copyright depend merely on publication, not on printing in any given country. It is not surprising that Canada should have replied by demanding whether the private interests of existing holders of copyright in Canada

should be placed above the powers of the Dominion and the clearly expressed wishes of its Parliament. Sir John Thompson, as Prime Minister, was determined to carry the Canadian claim for freedom both from the Convention and the Imperial Act of 1842, but his sudden death at Windsor in December 1894 postponed what promised to be a serious crisis in constitutional relations between the Dominion and the United Kingdom. The Dominion, however, did what it legally had the power to do: it suspended the collection of duty on foreign reprints imported into Canada, thus depriving British authors of any profits from that source. On the other hand, the British Government pointed out, and in 1902–3 the Canadian Courts[1] ruled, that the result of the suspension of the collection of this import duty was simply to bring into operation the original terms of the Act of 1842, under which the import into Canada of foreign reprints of British copyright works was absolutely prohibited. The prohibition of 1842 had been modified by the Act of 1847, but only for such time as there was ensured to the author an appropriate return from the imported reprints; once this ceased, as it had done in Canada, the terms of the Act of 1842 revived in full force. There was, however, not much consolation to the British author, for the procedure of stopping imports was neither expeditious nor effective, and the desire to compromise was strengthened by the declaration of the Privy Council in *Graves* v. *Gorrie*[2] that the Fine Arts Copyright Act had no application beyond the United Kingdom: so that British authors did not enjoy by Imperial legislation any protection for their pic-

[1] *Imperial Book Co.* v. *Black*, 35 Can. S.C.R. 488.
[2] [1903] A.C. 496.

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tures, drawings, and photographs, and probably not even for works of sculpture and engraving.

The final impulse to reconsideration was given by the Berlin Conference on Copyright in 1908, which revised in many particulars the Berne Convention. To secure acceptance of the new Convention appeared eminently desirable, and the whole position of the Dominions was re-examined in the Colonial Office. For the first time the principles of constitutional law involved were frankly faced, and the claim of Canada to autonomy was held unanswerable. In these circumstances the procedure was adopted of summoning a subsidiary Imperial Copyright Conference, at which the whole problem was thought out on the basis of the absolute equality of the Dominions with the United Kingdom. The outcome of the Conference was the Imperial Copyright Act, 1911, framed on a new and important principle. It was agreed that an Imperial Act was desirable, but it was not, as in the past, to be applicable *proprio vigore* to the Dominions. But any Dominion might adopt the Act, subject to the right to alter its provisions in respect of procedure and remedies as opposed to the main principles of copyright. If any Dominion thus adopted the Act, it would remain free later to withdraw its adoption—subject, of course, to respecting any rights acquired under it. A Dominion, however, if it preferred to emphasise its legislative independence, need not adopt the Act; if it passed substantially identic legislation, save as regards remedies or procedure or works first produced in that Dominion, it would be entitled to be treated as if it were a Dominion to which the Act applied. Even if a Dominion neither adopted the Act nor passed substantially

identic legislation, privileges might be accorded to it by the King in Council or by the Governor in Council of a Dominion. On the coming into force of the Act all older copyright legislation stood repealed, save as regards any Dominion to which the Act was not made to extend; but that Dominion was empowered to repeal such older legislation, thus terminating its subordination to the Act of 1842 and the Acts giving foreign countries copyright.

Like many things eagerly desired, the grant of freedom from Imperial control was only slowly made use of in the Dominions. Newfoundland and the Commonwealth, in which copyright issues had never been keenly discussed, were in fact the first to act, and they adopted the Imperial Act; the Union followed suit in 1916, while the Irish Free State came into existence with the Act of 1911 as part of its law. New Zealand preferred in 1913 to legislate on parallel lines, and became, therefore, a Dominion to which the Act applied. But Canada, the protagonist in the struggle, remained undecided as to action. The interests of printers, publishers, and authors were at variance, and only in 1921 did an Act secure acceptance. Even then the work was imperfect, for the measure violated the Berlin Conference, the results of which it was proposed to accept, by insistence on the favourite Canadian device of empowering the grant of compulsory licences for the publication of books which were not printed in Canada in sufficient quantities to meet the Canadian demand. The error was remedied a couple of years later: so that, twelve years after the constitutional struggle was over, Canada became a country to which the Imperial Act could be deemed to apply. In the long period inter-

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vening, the rights of Canadian authors or persons resident in Canada had been protected under Orders in Council conferring upon them similar privileges to those which would have been theirs under the acceptance of the Imperial Act. Even so, the measure was distinctly defective; it has proved that the conditions on which assignments of copyright under it can be made effective by registration as required by the Act of 1921 are practically incapable of performance, so that the measure is largely ineffectual as a means of protection to assignees in the United Kingdom. But as the Privy Council has observed,[1] the remedy in such matters lies not with the courts, which must construe the law, however defective it may be, but with the Legislature itself.

III. *Martial Law*

In one interesting set of cases the sanction of the Imperial Government has, however reluctantly, necessarily been granted. The maintenance of internal order in the colonies has necessitated from time to time the passing of measures to indemnify action taken under martial law or at least without due observance of legal forms. The causes of such irregularities have been numerous; the operations of the New Zealand Government against the Maoris involved the Administration in a serious dispute with the Imperial Government, which insisted on declining to accept an Indemnity Act in 1867 in the form in which it was presented, on the score that it was too indiscriminate

[1] *Canadian Performing Right Society, Ltd.*, v. *Famous Players Canadian Corporation, Ltd.*, 45 T.L.R. 232.

in its terms. But the growth of colonial autonomy may be noted in the acceptance, without serious protest, of the Natal Indemnity Acts of 1906 and 1908, which were both extremely wide in the protection which they gave to actions done during the suppression of the unrest in Zululand, provoked by the extremely defective management of native policy by the responsible Government which had prematurely been granted to Natal. The same colony was the scene in 1906 of the unfortunate dispute between Lord Elgin and the Ministry.[1] The Secretary of State, unused to the rules of responsible government, instructed the Governor to suspend the execution of certain natives under martial law, but, on their resignation as a result of this instruction, authorised the Governor to act on the advice of his Ministers. The episode was unhappy in every way, for on the one hand Lord Elgin's action undoubtedly was ill-advised in form, while on the other the Ministry which defied the Secretary of State did so in reliance on the protection of the Imperial forces, whose presence they continued to insist upon, while declining to accept the advice of the Imperial Government. But that Government could not be held blameless for its consent to hand over to a colony, unfit for the burden, the task of controlling the troubled affairs of Zululand.

The issue of the responsibility of the Imperial Government in such cases was the subject of full examination in 1914, when martial law was used in the Union of South Africa to quell industrial unrest and to deport labour leaders without trial and without legal warrant. An Indemnity Bill was immediately

[1] Keith, *Responsible Government in the Dominions*, Part II. chap. v.

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brought forward in the Union Parliament, and the propriety of withholding assent was urged by Mr. Ramsay MacDonald in the Imperial House of Commons. Mr. Harcourt, on February 12, 1914, explained fully the reasons which rendered it essential to leave to the Government of a Dominion the final decision in issues of this kind, and the impossibility of negativing the deliberate policy of the local Government responsible to a representative Legislature under the system of responsible government. He defended, also, the attitude of the Governor-General, who could not possibly have declined to sanction the proceedings of his Ministers: for if he had done so, they would have resigned and he would have been unable to secure the effective administration of the Union, in view of their possessing the confidence of the Assembly. Since then, no question of the possibility of intervention in the exercise of martial law or in the passing of Acts of indemnity has been raised. It is, in fact, manifestly essential that a Dominion must be able to secure its internal order; and if the Government misuses its power, that is a matter for the electorate or Parliament to correct. The extreme rigour of the measures of coercion[1] applied in the Irish Free State have, therefore, passed without comment in the Imperial Parliament, and have received the assent of the Governor-General without interference by the Imperial Government.

[1] *E.g.* in the Public Safety Act, 1927; Keith, *Journal of Comparative Legislation*, 1927, pp. 250, 251. So the Indemnity and Trial of Offenders Act, 1922, of the Union, was accepted without question.

CHAPTER V

TRADE AND SHIPPING

I. *Trade and Currency*

(A) *Trade.*—When responsible government was proposed for Canada, it was assumed by Lord Durham that control of trade would still largely rest with the Imperial Government. Down to the last, the rights of the Imperial Parliament to legislate on trade relations for the whole Empire had been conceded by nearly every leading American politician, and the British Government in its efforts to placate the rebels had gone no further than to declare in the Act of 1778 that the net proceeds of duties levied under its authority for the control of trade would be devoted to the service of the colonies. But this régime was shortly undermined by the movement in the United Kingdom for free trade, and in 1846 an important Act was passed, which conferred full power on the colonies to alter the tariff provisions applicable to North America. The cessation of the generous protection accorded to the colonies under the old régime elicited a strong protest from Canada, where it was bluntly pointed out that the loss of the advantage over the United States in the British market might be provocative of the doubt whether continued connexion with the British Empire

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was desirable. To this suggestion, which developed ultimately into the famous Annexation movement in Canada in 1849, Mr. Gladstone replied on June 3, 1846, that: "It would indeed be the source of the greatest pain to Her Majesty's Government if they could share in the impression that the connexion between this country and Canada derived its vitality from no other source than from the exchange of commercial preferences. If it were so, it might appear to be a relation consisting in the exchange not of benefits but of burdens; if it were so, it would suggest the idea that the connexion itself had reached or was about to reach the legitimate term of its existence. But Her Majesty's Government will augur for it a longer duration, founded upon a larger and firmer basis—upon protection rendered from the one side, and allegiance freely and loyally returned from the other; upon common traditions of the past and hopes of the future; upon resemblances in origin, in laws, and in manners—in what inwardly binds men and communities of men together, as well as in the close association of those material interests which, as Her Majesty's Government are convinced, are destined not to recede but to advance, not to be severed but to be more closely and healthfully combined under the quickening influences of increased commercial freedom." The doctrine of freedom was completed for Canada by the decision in 1849 to repeal the Navigation Laws and to permit Canada to enjoy the benefits of access to her ports by foreign shipping. As the Canadian Government most justly pointed out in 1848, the monopoly of trade with Canada which the policy of these Acts reserved to British shipping became utterly unfair when the pro-

tection granted to Canadian exports in the United Kingdom was taken away. Canada thus became free to determine the terms on which goods and ships would be admitted, and the other colonies received the same benefits. In 1850 the Act regulating the new Australian Constitutions permitted them freely to levy duties, provided that no treaty stipulations were violated, that no duties were levied on stores for the use of Her Majesty's forces, and that no differential duties were imposed. For a time such Bills were required to be reserved, as originally enacted in 1842, but this restriction disappeared in 1866; and in 1852 when New Zealand was given a Constitution, the power to levy tariffs was subjected only to the first two of the conditions imposed in the case of Australia. Full control over Customs legislation, hitherto dealt with by an Imperial Code applied to the colonies, was accorded by an Act of 1857; executive authority had already been transferred to colonial officers between 1851 and 1855; while in the same period the colonial Post Offices were emancipated from the Imperial authority which, since the reign of Anne, had been exercised throughout the Empire.[1]

Despite the withdrawal of control, it was, naturally enough, the conviction of the Imperial Government that the one aim of the colonies ought to be to embark on a régime of the completest freedom of trade, and hence not only were differential duties discouraged by instructions given repeatedly to Governors in the period 1843–95, but even the grant of bounties was discouraged. The principles actuating this policy are set out with much candour in Lord Grey's instructions

[1] W. Smith, *History of the Post Office in British North America* (1920).

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to Sir E. Head of December 11, 1849, when he declined to permit New Brunswick to grant a bounty on the production of hemp. The Imperial Parliament had adopted definitively the policy of abandoning any effort to direct capital and industry by artificial means into channels which they would not naturally seek. The benefits from this line of policy would be greatly enhanced by the adoption of the same policy by the principal nations of the world, and it would greatly interfere with this happy result if the permission of Her Majesty's Government were known to be accorded to the adoption in any part of the British dominions of the old policy of artificial stimulus. Moreover, New Brunswick would be certain to suffer heavily from the proposed policy: capital was admittedly scarce, and, therefore, should be used to the best result; but the grant of a bounty *ex hypothesi* presumed that capital would be diverted from its more profitable natural use to some less lucrative end. The argument that infant industries often need protection is, naturally, ignored entirely in this despatch.

The British Government, however, was perfectly open to reconsider its position when Canadian interests were clearly concerned, and it deviated from its objection to differential duties so as to allow of inter-provincial preferences in Canada in 1859 and 1866, and even consented that Canada in 1854 and 1871 should, under treaty with the United States, obtain treatment therein superior to that given to the United Kingdom itself. These measures, however, had one common merit—they all tended towards tariff reductions and freedom of trade; and it was with distinctly different feelings that the first protective tariff of Canada was

received in 1859. The Sheffield Chamber of Commerce sent in a reasoned protest to the Colonial Office, and some grave words of advice against embarking on the new policy were addressed to the Canadian Government by the Duke of Newcastle, though he was careful not to threaten disallowance of the Canadian Act. The reply of the Canadian Minister of Finance was a classical exposition of the right of Canada to determine her own policy, though it may be admitted that the vehemence of Sir A. Galt's protest was distinctly unnecessary. The Provincial Ministry was ready at all times to afford explanations of its measures, "but, subject to their duty and their allegiance to Her Majesty, their responsibility in all general questions of policy must be to the Provincial Parliament, by whose confidence they administer the affairs of the country; and in the imposition of taxation it is so plainly necessary that the Administration and the people should be in accord, that the former cannot admit responsibility or require approval beyond that of the local Legislature. Self-government would be utterly annihilated if the views of the Imperial Government were to be preferred to those of the people of Canada. It is, therefore, the duty of the present Government distinctly to affirm the right of the Canadian Legislature to adjust the taxation of the people in the way they deem best, even if it should unfortunately happen to meet the disapproval of the Imperial Ministry. Her Majesty cannot be advised to disallow such Acts, unless her advisers are prepared to assume the administration of the affairs of the colony irrespective of the views of its inhabitants." It is curious to reflect that the tariff defended in such glowing terms was of a most innocuous character, as the Finance

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Minister proceeded to show in detail.[1] Indeed, it was not until 1879 that Canada approached serious protection, and long ere then it had become an accepted commonplace that each colony should order its tariff policy as it thought best.

Lord Grey, as a convinced free trader, was all eagerness to secure that boon for the Australian colonies *inter se*, and he would fain have included federal provisions in the Act of 1850,[2] but neither locally nor in the Imperial Parliament was there sufficient enthusiasm to admit of pressing this proposal. He solemnly advised the colonial Governments in the following year to adopt the benefits of the glorious system of free trade. The appeal fell on deaf ears, especially in Victoria, in which a curious desire prevailed not to do anything which was approved in New South Wales. The attitude of the Imperial Government was, however, suspect, and some of the bitterness in the quarrel between the two Houses of Parliament in Victoria in 1865-6 was motived by the belief that the Imperial Government favoured the preference of the upper chamber for freedom of trade. Practical difficulties in due course forced on New South Wales and Victoria the merits of some arrangement, but, though the Imperial Government announced in 1868 its readiness to help on any project for a Customs Union, a Conference at Melbourne in 1870 failed to achieve any agreement on a uniform tariff. New South Wales was flatly set on securing the maximum freedom of trade, while Victoria was absolutely convinced of the merits of protection, and in the long run all that could be agreed upon was

[1] *Selected Speeches and Documents on British Colonial Policy*, ii. 51-83.

[2] *Ibid.* i. 210-14.

that the colonies should be set free from the Imperial instructions forbidding the Governors to refuse assent to Bills imposing differential duties, and should be allowed to adopt a system of inter-colonial preferences, such as had been in force in Canada before federation removed the necessity for them. Tasmania and New Zealand indeed actually attempted to give effect to the new policy, but the Bills were, under the instructions, duly reserved. New Zealand, however, somewhat complicated the position by demanding not merely the right to accord differential treatment to British colonies but the power to extend similar terms to foreign Powers, reminding the British Government that Canada had been permitted to adopt this course in respect of the United States. It was clearly unfortunate thus to confuse the issue; the precedent of Canadian inter-colonial preferences was indeed in point, but the circumstances affecting Canada and the United States were obviously largely of a kind without parallel in the relations of the Australasian colonies with foreign Powers. Apart, however, from this side of the case, the British Government deprecated the proposal to give preference to colonial manufacturers at the expense of British exports; this policy would weaken the relations between the mother country and the colonies, with results not desired by the colonies. Inconsistently enough, it was suggested that these objections would not apply to a Customs Union of Australia. But, above all, the advantages of freedom of trade and the objections to differential tariffs were reiterated, without at all convincing the recalcitrant colonies. Ultimately a further Conference in 1872 simplified matters by rendering the issue of domestic character, for New Zealand alone per-

sisted in asking for powers to give preference to foreign States. Accordingly, an Imperial Act of 1873 permitted the Australasian colonies to grant differential duties to one another, but not to other parts of the Empire or to foreign countries.

As so often where claims were urgently made, their concession was not followed by the action expected. The Australasian colonies, which a moment before had been deluging the Secretary of State with memorials of great ability proving that they were being unjustly restrained from bestowing on the rest of the group benefits of the highest importance, suddenly realised that they could not agree with their neighbours on the terms appropriate, and nothing whatever resulted from the Act of 1873. Not until 1894 was the issue once more raised. At the Conference at Ottawa in that year, convened by the energy of the Canadian Government, attention was given to the question of inter-colonial preference, as well as to the treaty aspect. The Imperial Government conceded the right to the colonies to give preferences *inter se*. For this end the Act of 1873 was amended to remove the restriction forbidding preferential treatment of any save the Australasian colonies, and the other colonies were informed that legislation of this character, though it must be reserved, might receive the Royal assent. The matter, however, was carried further by the Colonial Conferences of 1897, 1902, and 1907: for, while the Imperial Government could not pledge itself to grant preferences to the Dominions, it had to waive any criticism of inter-colonial preference, and the rule as to reservation passed into oblivion.

Preference to the United Kingdom was delayed by

difficulties arising out of the treaties with Belgium of 1862 and the German Zollverein of 1865, which nullified largely the value of the Canadian decision to grant preference in 1897. But this obstacle was removed in 1898 as the outcome of the Colonial Conference of 1897, and an effective British preference was accorded by Canada in 1898, while offers were made of favourable terms to other parts of the Empire. This example was followed by the South African Customs Union in 1903, and by New Zealand. Australia secured a reciprocity agreement with the South African Customs Union in 1906, but ruined the value of her offer in that year of a British preference by restricting it to goods imported in British ships manned by white labour. The former condition rendered the proposal impossible of acceptance, as it would have violated treaties binding on the Commonwealth; the latter was a deliberate attack on the employment of Indian seamen and would, in any case, have rendered the offer unacceptable. The Bill, therefore, to effect the proposals was reserved, with the assent of the Commonwealth Government, and the limitations on the preference were most wisely dropped by Mr. Deakin after the Colonial Conference of 1907. A preference was then accorded freely to the mother country, while bargains were attempted, but in vain, with New Zealand and Canada.

The Imperial Conference of 1911 saw the British Government adamant against preference, and, as a compromise, a Royal Commission was set up to tour the Dominions and recommend such measures to ensure closer trade relations as might accord with the fiscal policy of each part of the Empire. This body's efforts were rendered unavailing by the outbreak of

the war, but that struggle involved a new orientation of Imperial policy, which at the Conference of 1917 adopted the view that the Empire should, as far as possible, be made self-supporting in respect of food supplies, raw materials, and essential industries. In 1919 the British Government at last secured the grant by Parliament of preferences to the Dominions, and the Imperial Conference of 1923 on economic matters provided for a considerable increase of these grants. The promises involved the grant of preferences on one or two articles not already taxed, thus violating the rule hitherto adhered to, that no tax should be placed on food in order to give a preference; and the difficulties thus caused to the Government were increased by the decision of the Prime Minister, arrived at on grounds wholly unconnected with Dominion issues, that protection for British industries was essential. The general election precipitated on this issue caused the defeat of the Government. But, while the Labour Government was precluded by the clear voice of the electorate from conceding the exact preferences promised in 1923, it very properly made amends by adopting a generally sympathetic attitude towards the Dominions, and on its fall in 1924 the matter was reconsidered by Mr. Baldwin's Government. It was felt impossible to adopt any policy involving taxation of food, and accordingly a grant of £1,000,000 was made annually for the purpose of aiding the marketing and sale of Empire produce. It was, not unnaturally, made a source of complaint by the British producer of agricultural produce —hard hit by economic conditions—that competition against him in the British market should thus be subsidised by British taxation, and the scope of the work

of the fund was extended to apply to the marketing of British produce.

Curiously enough, this generosity on the part of the Imperial Government, which also expressed itself in 1926 by pledging the continuance of the grant of the Dominion preferences, elicited no very hearty response in the Dominions, even though British aid was supplemented generously under the Empire migration scheme by grants for Dominion development and land settlement. The policy of Canada, Australia, and New Zealand indeed continued to accord preferences of value, but all three Dominions legislated exactly in accordance with local interests and on the basis of securing effectively their own industries from British competition.[1] In the case of Newfoundland no preference was conceded; the Prime Minister confessed after the Imperial Conference of 1926 that the matter had been brought to his attention, but that, in view of the desire to come to terms with the United States, action to meet British interests was undesirable. More serious was the position created in the Union in 1925, when General Hertzog's Government came forward with a proposal to reduce all preferences to a strictly business basis. This was an interesting development, quite foreign to earlier Dominion thought. In the case of their grants of British preference the desire for reciprocity had naturally existed, but it was always recognised that, apart from this, the grant was justified by the great benefits accruing to the Dominions from the protection accorded to them and the services rendered to them by the British diplomatic and consular services. These items of obligation were, perhaps naturally, ignored by a Ministry which

[1] *The Round Table*, xviii. 417, 418.

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still hankered after full independence, and stress was laid on the figures, which showed that the British preference was worth much less than the South African concessions. It was proposed then to reduce the total preferences accorded, put at £860,000 for the United Kingdom and £90,000 for Canada, Australia, and New Zealand, with which special agreements existed, to £300,000 for the former and £50,000 for the latter. Peculiarly unfortunate was the attitude adopted by the leader of the Labour Party and coadjutor of General Hertzog, Colonel Creswell, for he objected to the doctrine that the United Kingdom should profit by the Dominions, alleging that it was the principle which had brought about the loss of the First Empire. Further feeling was aroused by the discovery that the Government proposed to take power to negotiate treaties with foreign Powers under which concessions might be made which would be denied to the United Kingdom. The lack of generosity of the course proposed was gradually realised—it must be remembered that the United Kingdom offers an excellent market to South African goods and has supplied capital freely—and, though General Smuts failed to secure acceptance of his own proposal that in any concessions granted to foreign Powers preferences should be reserved to the United Kingdom, the Government agreed that the United Kingdom should automatically receive every concession made to any foreign Power. Moreover, it consented in 1926 by an amending Act to secure to the United Kingdom the benefit of concessions granted under existing arrangements to the Dominions, but, probably *per incuriam*, withheld hitherto from the United Kingdom.

The attitude of the Imperial Government through-

out this exciting and heated controversy was admirably detached. It was made clear that the legislation of South Africa must decide the issue, and that the British claim to consideration must be dealt with entirely as seemed best to the Parliament of the Union. As a practical sign of good-will, every effort has been made by the Empire Marketing Board to promote the sale of South African produce, but it has been noted with regret by the Opposition in the Union Parliament that the South African Government has shown reluctance to co-operate with the Board in its Imperial aims.

It was widely expected that the arrangements made when responsible government was conceded to the Irish Free State would obviate the possibility of any interference with the régime of free trade between the United Kingdom and the new Dominion. Indeed, Mr. Lloyd George at one time committed himself definitely to the doctrine that free trade was an indispensable condition of the grant of the new status to Ireland. In the ultimate issue, however, this point, with others, was sacrificed in face of the Irish determination to fight and the reluctance of the British Government to continue the unpopular struggle, in which many of its supporters had long ceased to believe. It was, however, expected by many politicians that the concession of the power of fixing its own tariff to the Free State would not be followed by any wide exercise of the authority, and this belief was strengthened when the report of an independent and weighty Commission set up by the Free State Government was definitely opposed to any policy of protection. In point of fact, however, the policy of the Free State was definitely oriented in the direction of protection in order to establish manufacturing indus-

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tries in the State.[1] The idea of the adoption of a general tariff has been ruled to be economically disastrous, because it would condemn the Free State to uneconomic and inefficient methods in certain industries; but a steady process of extending protection has been adopted, with its usual accompaniment of inconvenience and loss to British manufacturers, who find their plans suddenly upset by changes in the tariff rates. When it is considered that the Irish Free State finds infinitely its best market in the United Kingdom, it is obvious that if the British Government cared to retaliate by imposing a tariff on Irish imports, it would be able to compel the abandonment of a policy of protection against British imports, and that the Free State derives a rather unjustifiable benefit from the forbearance of the United Kingdom.

(B) *Currency.*—In the case of currency also the attitude of the Imperial authorities has changed completely since the early days of responsible government. In 1850 a Canadian Currency Act was disallowed; it was objected to it that it sought to confer on the Governor-General the Royal prerogative of coinage, and that it assumed the right to regulate the rate at which foreign coins should pass current in Canada. The attitude adopted was that which induced the British Government, year after year, under the old régime in North America before the rebellion, to endeavour to prevent the colonies debasing their currency. In 1871, after the creation of the Dominion, an Act was allowed to become operative, but it expressly recognised the

[1] See D. Gwynn, *The Irish Free State*, pp. 234-50; *The Round Table*, xviii. 825-8. Heavy losses were caused in 1929 to British exporters by an alteration, without notice, of the tariff on woollen manufactures.

prerogative of the Crown and provided for the determination by Royal proclamation of the rates at which coinage struck in Canada should pass current. In 1910, however, a new step was taken: the whole matter of Canadian currency was now regulated afresh by a Dominion Act, under which there is given to the Governor in Council the control of currency in Canada. The use of British gold, the rates at which foreign coins shall pass current, and the value to be attached to Canadian coinages are all regulated by or under the authority of the Act. The measure was, of course, passed with the complete approbation of the Imperial Government, which has co-operated with Canada by establishing at Ottawa a branch of the Royal Mint, so that Canadian coinages can be manufactured at the least cost. The constitutional position of the Mint is interesting: Canada pays the expenses of the staff, etc., but the final control rests with the Imperial Government, as the Ottawa Mint is essentially in law a branch of the Imperial Mint, and its officers are subject to the control of the Crown under the Coinage Act, 1870, and its amendments.

In Australia, circumstances long rendered the creation of an independent currency quite needless, for there was obviously nothing to induce the adoption of a dollar or other non-English system. The Imperial Government established mints at Sydney in 1855, at Melbourne in 1872, and at Perth in 1898, where Australian gold could be converted into sovereigns; and English subsidiary coinage was sent out as required, the importers paying face value, while the British authorities bore the cost of carriage and were bound to repatriate outworn coinage. It was not until

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the Colonial Conference of 1907 that the Commonwealth Government obtained a change of régime. It was then agreed that Australia might have a new subsidiary coinage of her own, while the British Government would remove the existing coinage at the rate of £100,000 a year. Gold would continue to be manufactured at the Royal Mints under Imperial authority, the Commonwealth, as before, paying the expense and making such profit as there was. The whole scheme was carried into effect by an Act of 1909, but it was necessary, in order to allow the Act full effect, that the Imperial Orders in Council of 1896 regulating coinage should be repealed, and these were accordingly withdrawn by the Order in Council of January 23, 1911. The rates, therefore, for the use of British currency or Australian currency in the Commonwealth are now regulated by the Commonwealth Act.

It was inevitable that these precedents should be claimed by the Union as applicable to it, and accordingly in 1919 a branch of the Royal Mint was duly established at Pretoria in the usual conditions, the control remaining in Imperial hands, while the cost is defrayed by the local Government and the profits accrue to it. It was further arranged that under an Act of 1922 the Mint should coin a distinctive South African subsidiary coinage, and the British Government accepted once more the duty of repatriating British coins. In this case again purists have objected to the fact that the Royal Mint controls the Pretoria branch, but even the most energetic supporter of Dominion sovereignty can hardly see anything sinister in the common-sense employment of the agency of the Mint.

It was equally inevitable that the Irish Free State should be unwilling to consent that the Royal effigy should be continued on the coinage of a Dominion which had republican aspirations, and the Coinage Act, 1926, made provision for a special Irish coinage.[1] There followed in 1929 a strong pressure on the British Government once more to do its duty at the expense of the long-suffering British taxpayer, and to shoulder the burden of repatriating the British subsidiary coinage current in the Free State. The demand was without merits, but the usual surrender of British interests was duly made, though the Chancellor consoled himself by securing the reduction of the amount to be taken back to £750,000. By an unfortunate coincidence, this extra burden fell upon the taxpayer at the same moment as he was compelled to bear the burden of paying to the Irish loyalists the compensation which had been refused to them in the Free State, and making up the sums due to Civil servants under the interpretation by the Privy Council of Article X. of the treaty of 1921.[2]

II. *Merchant Shipping*

The Imperial regulation of British shipping was an integral part of the system of the Navigation Acts which came to an end in 1849, and it followed naturally from their abrogation that authority should be given to the colonies to regulate ships registered therein. This was accordingly carried out by an Act of 1854 which empowered colonial Legislatures to repeal provisions of the Imperial Acts regulating shipping, and thus these

[1] Gwynn, *The Irish Free State*, pp. 348-50. The Royal Mint manufactures the coins.

[2] Announcement in Parliament and the Dail, February 20, 1929.

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Legislatures were enabled to substitute for the British code a special set of rules applicable to their own registered shipping. This was followed in 1869 by a further important concession. The powers of colonial Legislatures were now extended to regulate the coasting trade of the colonies, subject to the rule that there must be no differentiation against British or colonial shipping, and that any treaty rights accorded before the passing of the Act should be respected. To these powers must be added that under the Act of 1854, as supplemented in 1862 and 1882, authorising the holding of inquiries into shipping casualties by colonial courts and the suspension or cancelling of certificates of masters or mates, subject to an appeal to the High Court in England or to the Board of Trade. These provisions are duly consolidated in the great Merchant Shipping Act, 1894,[1] and still govern the relations of the Dominions and the United Kingdom, while in a number of minor points authority is conferred on the Dominions by the Act.

It was natural that difficulties should arise between the colonies and the United Kingdom as the former developed. Canada in 1878 determined to regulate the space to be occupied by deck cargoes on all vessels visiting Canada, but in the following year the Act was, on Imperial representations, modified to apply only to ships within Canadian jurisdiction. Much more bitter was the dispute over Acts of 1891 and 1893, which were never permitted to become effective, and which would have laid down new rules as to load-lines. Such legislation, of course, would have been legitimate in an independent State, but the British view was that the

[1] Keith, *Responsible Government in the Dominions*, Part V. chap. vii.

proposed enactments were in themselves unwise; that they would unfairly hamper British ships; and that, if enforced against foreigners, they would elicit retaliation, the burden of which would fall on the whole of the British mercantile marine. The issue died away, as did the contemporaneous dispute as to copyright, largely because of the domestic difficulties which involved the Conservative Administrations of the Dominion after the death of Sir John Macdonald in 1891 and of Sir John Thompson in 1894.

In 1903, however, the whole matter assumed a new aspect. There had long been growing in New Zealand and Australia a demand, not so much for control of shipping as a constitutional issue, but for the improvement of the conditions of seamen and the securing for them of greater comfort and safety. Hence New Zealand passed in 1903 a Bill which aroused considerable anxiety in the United Kingdom, and to which assent was given in 1905 only on the express condition that the whole subject should be investigated by a Conference. In this the Commonwealth was invited to participate, for it also had under consideration a Bill which made drastic alterations in the rules laid down by Imperial legislation. The Merchant Shipping Conference of 1907 investigated the issues very thoroughly, and accord was reached. It was agreed that "the vessels to which the conditions imposed by the laws of Australia or New Zealand are applicable should be (*a*) vessels registered in the colony, while trading therein, and (*b*) vessels, wherever registered, while trading on the coast of the colony". It was also agreed that a vessel should only be deemed to trade on the coast if it took on board at one port passengers or merchandise

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to be carried to another port. In effect, the resolution meant that the rules laid down in the Acts of 1854 and 1869 respectively should be accepted as being just and reasonable, and that they should be interpreted so as to give the fullest authority to the colonies to deal with the two classes of shipping mentioned.

In the case of the Commonwealth the extent of legislative power is greater than in that of other Dominions, for the Constitution Act provides that the laws of the Commonwealth shall be in force on all ships, other than the vessels of the Royal Navy, whose first port of clearance and port of destination are in the Commonwealth; and it is thus possible for the Commonwealth to make its laws operative on board ships engaging in trade among the Pacific Islands but with headquarters in the Commonwealth. There is, however, obviously possible a conflict of jurisdiction with New Zealand, in cases in which a ship subject to Commonwealth law trades on the New Zealand coast, and the courts of the two Dominions have been unable to lay down any very clear rules regarding the control of their ships. The difficulties in the way of legislation have in each case been considerable, and in the Commonwealth it was not until 1912 that the Navigation Act could be passed. Under it, the conditions imposed on trading on the coast are such as to shut out from this operation practically all ships from overseas, for the scale of accommodation and rates of pay imposed are prohibitive.[1] The result, however, has been far from gratifying to the people of Tasmania, among others, for the position of dependence on local shipping

[1] Acts of 1925 and 1926 permit the Government to relax the conditions for special reasons.

thus brought about has been exploited unmercifully by the seamen, and Australia has won a very unfortunate reputation for shipping difficulties. Repeated efforts have been made to hold up shipping and to compel surrender by the shipowners; while, as the result of such tactics, the Commonwealth Shipping Line created by Mr. Hughes proved so ruinously expensive to run that it was finally disposed of by the Government of Mr. Bruce. The most unfortunate feature of the case is that both the New Zealand Acts and those of the Commonwealth contain many provisions whose legal effect is far from certain, and whose application, therefore, is productive of confusion and friction.

Still further confusion would probably have arisen had the Maritime Convention as to safety of life at sea (which was concluded in 1914) ever become effective in the form contemplated by the Imperial Act of 1914, which was passed to bring it into operation; but the taking effect of the Act has been periodically postponed pending the reconsideration of the Convention of 1914. Now this has been effected, it may be hoped that the matter will be dealt with effectively in all the Dominions by concurrent legislation. There are clearly serious objections in practice to piecemeal action in these issues. The British decision to accept two Conventions on collisions and salvage, which was carried into legal effect by the Maritime Conventions Act, 1911, was deliberately limited to the United Kingdom, leaving the Dominions free to act as they think fit, with the result of lack of uniformity and much confusion. There has been brought about a more effective system in the case of wireless telegraphy, for the rules adopted

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by Imperial legislation permit the use of wireless apparatus both on the high seas and in territorial waters by ships registered in British possessions, provided that they act in accordance with licences issued by the Governments of those possessions.

CHAPTER VI

MILITARY AND AIR DEFENCE

Lord Durham, whose visit to Canada coincided with grave manifestations of unrest and of preparations for invasion from United States territory by Canadian malcontents and their supporters, naturally did not dream of the relaxation of the military control over Canada exercised by the presence of effective British forces. His attitude regarding the control of the local militia in the provinces is not clearly defined in his report; presumably he would have assumed that their subordination was for the moment sufficiently secured, and that the situation might be allowed to develop on natural lines. For a time, therefore, the practice of leaving Imperial forces in the colonies continued, despite the grant of self-government and the serious cost involved on the Exchequer—in 1858 the charge amounted to over £4,000,000, while colonial contributions came only to £380,000. The Crimean War strengthened the objections to this use of Imperial forces, for it proved how serious was the loss of efficiency, and the issue was carefully investigated both departmentally and by Committees of the House of Commons. The Select Committee of 1861 was specially clear in its views, thanks to Mr. Gladstone's

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guidance. It conceded the right of the colonies to full protection against dangers created by Imperial policy, but it emphasised the necessity of returning to the older policy, under which colonies in matters of local defence were largely self-supporting. Finally the House of Commons on March 4, 1862, resolved: "That this House, while it fully recognises the claims of all portions of the British Empire on Imperial aid against perils arising from the consequences of Imperial policy, is of opinion that colonies exercising the rights of self-government ought to undertake the main responsibility of providing for their own internal order and security and ought to assist in their own external defence."

The policy thus enunciated was not intended to be carried out with undue haste or to inflict hardship on the colonies, but its execution was accelerated by the experience of the forces in New Zealand in the period between 1862 and 1870. The Imperial Government, perhaps naturally, was only too anxious to secure the acceptance by the colony of the burden of native administration, and insisted on its transfer in 1863. The Governor, Sir George Grey, had pressed for the transfer, because he hoped in effect himself to control native affairs without responsibility to the Imperial Government, and he expected that Ministers would readily leave to him the real conduct of native relations. In point of fact, the plan did not work out as he anticipated, and he was soon involved in disputes, partly with his Ministers, but chiefly with the Imperial officer in command of the troops and the Secretary of State.[1] The lot of the commander of the forces

[1] Collier, *Sir George Grey*, chap. xxi.; Henderson, *Sir George Grey*, chap. xiv. and xv.

was distinctly unpleasant; he disliked, with justice as is now conceded, the policy of the Government of punishing rebellions provoked by misgovernment by the harsh measure of wholesale confiscation, and he resented the criticisms of his handling of the Imperial forces by the Government and the indiscreet efforts of Ministers to communicate directly with one of his subordinates. As he had the right of direct communication with the Secretary of State for War, his criticisms of the Governor and Ministers were resented by the latter, while the Governor asserted, without justification in law, that he was Commander-in-Chief in the colony and accordingly in supreme authority over the Imperial forces. The War Office naturally repudiated this absurd claim, and first deprived him of control in any degree over the employment of the major part of the forces, and at last withdrew in 1870 the last battalion. By that time, however, the position of the colonist had been secured; the Maoris had been reduced to a sullen submission, and their power had been broken for good. The exchange of views between the Imperial and the colonial Governments had often been bitter. The British Government rightly insisted that it would render the United Kingdom a mere tributary to the colony if the latter were entitled to the use of Imperial forces at pleasure. It was made evident to all that the use of Imperial troops in operations caused by a policy which the Imperial Government could not control was wholly unwise, a fact which is of fundamental importance in the question of the Indian claim as expressed in Pandit Motilal Nehru's scheme for the concession of Dominion status to India. Of the loyalty of the New Zealanders of the day to the British con-

nexion there could be no doubt, but their native policy was such as should never have been carried into effect by the use of British troops. Nor in fact did these troops prove specially well adapted for the guerilla warfare which the Maoris delighted to carry on.

The withdrawal of troops from Australia fell in the same year as their removal from New Zealand, and a year later Canada was deprived of all Imperial forces save those maintained as Imperial garrisons at Halifax and Esquimalt as bases of the navy. A year before Imperial aid had been readily given to Canada in the Red River Rebellion, and Riel and his supporters had hastily fled on learning of the arrival of Colonel Wolseley's force. It had, however, long been obvious that Canada would not develop her militia forces effectively unless some pressure were brought to bear, and the failure of the Canadian Parliament to carry out the scheme suggested by its own Government in 1862 created a deep impression in the United Kingdom. The issue of defence was constantly in the minds of the British Government, and formed an important motive for the encouragement extended to the Canadian statesmen who brought forward federation. Funds were promised to aid in the erection of fortifications, and military considerations[1] dictated the terms on which the Imperial Government would aid in the construction of railway communication between the Maritime Provinces and Canada proper. It was indeed recognised that there would be the greatest difficulty in resisting an attack from the United States if that were attempted, and every effort was made to obviate such a contingency by adopting a most conciliatory

[1] See R. G. Trotter, *Canadian Federation*, pp. 172-5, 195-8.

attitude towards the sometimes exigent demands of that power, but a categorical assurance was duly conveyed to the new Dominion that, if attacked, the whole force of the Empire would be available for her defence.

The treaty of Washington, with its enormous sacrifice of British *amour propre* in the shape of the assent to arbitrate the *Alabama* claims, restored peaceful relations with the United States, and naturally enough the Canadian militia, which had been reconstituted after federation, ceased to attract much attention on the part of the Government. In theory all males between 18 and 60 might be called out in case of invasion, war, or insurrection, or of danger of any of these events, and might be required to serve in or outside Canada. In practice compulsion was never employed, and a small permanent force trained a very limited number of volunteers for short periods. Constitutionally the force was entirely under Canadian control, but by an Act of 1883 it was required that the officer commanding should be chosen from the Imperial forces. The rule had unfortunate effects, because the British officers, appointed from time to time, could not rid themselves of the feeling that they were in some sense responsible to the War Office rather than to the Government of Canada. The issue came to a head in 1904, when Lord Dundonald protested publicly against the interference of an acting Minister in militia appointments. The action of the Minister was utterly unwise, but that of the Major-General was open to censure, and his removal from office was inevitable. The system was now altered in the direction of emphasising the purely Canadian control of the force. A Militia Council, under the Minister of Militia, was substituted for the

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Major-General as in supreme authority over the force, and an Inspector-General, who might be either an Imperial or a Canadian officer, was given many of the functions of the Major-General. Moreover, to remove suspicions which had been on foot during the South African War, it was made clear that liability to service in the militia was restricted to service within or without Canada, for the defence of Canada. Thus the militia force assumed absolutely definitely the character of a local force, intended to serve local needs of preservation of order and defence against attack, but not to take part in oversea expeditions.

On losing the services of the Imperial forces the Australasian colonies felt it unnecessary to do much for their defence, for they had no danger to fear from the aborigines, and the British navy secured them from foreign attack. Small permanent forces gradually were created, especially in the period 1883–6, and some small progress was made in the erection of fortifications at vulnerable points. The tension with Russia in 1877 unquestionably aroused some anxiety, but the Colonial Conference of 1887 showed no great perturbation, though, as a result of its deliberations, Major-General Bevan Edwards visited Australia and suggested federation for military purposes. Mr. Chamberlain sought to encourage the defence movement by suggesting at the Colonial Conference of 1897 interchange of regiments with the United Kingdom, but the proposal was coldly received, save by New Zealand. Mr. Seddon secured the passing of an Act in 1900 which contemplated the creation of an Imperial Reserve, available for service outside as well as within the colony, to be maintained, in whole or part,

at the cost of the Imperial Government, and he renewed the discussion at the Colonial Conference of 1902 by suggesting that this principle should be generally accepted. The Cape and Natal alone showed sympathy, and the proposal was later abandoned even by Mr. Seddon. There were obvious difficulties to be faced regarding control, and the general impression among the Prime Ministers in 1902 was that a force which was in any sense removed from the complete control of Parliament was an anomaly and irreconcilable with the principles of self-government.

The federation of Australia in 1900, though it was not to any very great extent promoted on grounds of defence, and at first resulted in a decrease in the strength and efficiency of the local forces, nevertheless proved a preliminary to serious military reconstruction. The "White Australia" policy[1] involved the rigid exclusion of Oriental races from the continent, and far-seeing Australians recognised that this policy might ultimately lead to friction with Japan or China, and must be supported by the power of the Commonwealth to defend its own shores. Hence the Labour Party secured in 1903 and 1904 the adoption of legislation imposing on all male inhabitants between 18 and 60 the duty of serving in Australia in time of war. At the same time a change in the system of control of forces was made analogous to that adopted in 1904 in Canada, and motived by the same conditions. Major-General Hutton, who had come into conflict with his civil superiors in Canada during his command there, suffered the same fate as in the Dominion. It was felt that the system of appointing an officer to the com-

[1] M. Willard, *History of the White Australia Policy* (1923).

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mand-in-chief was to give him too independent a position, and that an Imperial officer in this position was bound to look too much to the views of the Imperial War Office. Hence a Council of Defence was given authority with an Inspector-General and a Military Board working in subordination to it. New Zealand adopted in 1906 the same policy, but found it needlessly cumbrous and reverted in 1910 the appointment of a commandant; the change was furthered by the fact that Imperial officers serving under the New Zealand Government had been able to adapt themselves with remarkable success to civilian control in high policy.

So far the military preparations of both Australia and New Zealand had been, as in Canada, of negligible proportions, and reliance had been placed on naval defence against any serious attack, though, as in Canada, the right of the State to command in case of war the services of all its manhood had been formally placed on the statute book. The Labour Party, however, had leaders who wished for further action, and the menacing state of affairs in Europe in 1908–9 resulted not merely in important developments in naval defence, but in the determination to introduce compulsory training both in the Commonwealth and New Zealand. The steps taken by Acts of 1909 were timid and hesitating, for under them compulsion was restricted to non-voters, and only boys under 21 were liable to training. A complete change, however, was effected in the following year, as the outcome of Lord Kitchener's visit to the two Dominions. The plan of compulsory training was frankly accepted, and applied to boys between the ages of 12 and 25, and the new

system was in force in the two countries when the war of 1914 broke out.

The position of affairs in the Union of South Africa was then in many respects different. It had been proposed in 1869–72, when the discussions as to the grant of responsible government were proceeding, to withdraw the whole of the British garrison save that of Simon's Bay, which was to remain a naval basis. But though this project was logical, it proved quite impossible of execution. Basutoland was unwisely annexed to the Cape in 1871 to 1883, only to prove unruly and dangerous,[1] and the discovery of diamonds opened up a long and unfortunate history of difficult relations with the Boer Republics, to which was added the burden of Zulu wars, the resulting annexation of the Transvaal, its revolt and subsequent strained relations. Similarly, while Natal was warned to put her house in order when responsible government was conceded in 1893, and it was proposed to withdraw in five years the garrison there, the project became quite out of the question. Relations with the South African Republic were so difficult and the future so menacing that in 1899 an unqualified assurance of Imperial aid was given to Natal, and the effort to carry it out to the letter explained some of the military blunders of the opening of the Boer war. After the conclusion of peace, of course, it was impracticable to withdraw the Imperial forces until peace was fully established, but the grant of responsible government to the conquered colonies greatly simplified the situation by lessening the effective motives to rebellion, and the consummation of the

[1] E. Walker, *A History of South Africa*, pp. 355-60, 386-90, 398-400.

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Union of South Africa in 1909 suggested that the Imperial forces could shortly be withdrawn, save in so far as they might be requisite for preservation of order in the native territories, Basutoland, Bechuanaland, Swaziland, or in Rhodesia. The desire of the British Government to secure the limitation of Imperial forces to employment for Imperial ends was stimulated by the events of 1912, when it became necessary for Lord Gladstone as Governor-General to call upon the Imperial troops for aid in repressing industrial disorder at Johannesburg. There was no doubt that the action taken was absolutely necessary in the circumstances, for the Union Defence force was only in an inchoate condition, and the danger to the country was imminent and grave, but none the less it was clearly unsatisfactory that Imperial forces should be called upon to intervene in a situation created, according to the opponents of the Government, by its gross mishandling of Labour issues and its partiality to the mineowners. There was, therefore, much satisfaction felt in the United Kingdom at the passing of the Defence Act, 1912, which established the principle of the duty of European males between 17 and 50 to serve in time of necessity, and provided training for those between 21 and 25, with facilities for starting at age 17 if preferred. In the system as put into operation there was one important difference between the case of the Union and those of Australia and New Zealand. In the latter, while exemptions from training were numerous, the principle was that all youths must serve, while financial reasons in the Union precluded the attempt to carry out universal training, and that the actual trainees were those who came forward voluntarily to take the course.

Relations between the Imperial and Dominion Governments, in respect of these forces, were normally simple. The local forces were recognised as being subject to ministerial control, while Ministers, more or less readily, availed themselves of the skilled advice which was tendered to them by the Imperial officers who normally were appointed to the chief command, or served as Inspectors-General under the later form of régime. Difficulties could arise only when there were Imperial forces in the colony, and it was proposed that they should co-operate, and after 1870 this state of affairs was not common. In Canada the Imperial garrisons played no part in the normal defence against internal disorder after 1870. Thus the North-Western Rebellion of Louis Riel, which was only put down with considerable bloodshed, was dealt with entirely by Canadian forces and not, like his earlier revolt, by Imperial troops accompanied by Canadians acting under the supreme command of the Imperial officer. In the Cape matters were different, for the function of the Cape local forces, as charged under the Ministry with local defence, were hard to separate clearly from the position of the Imperial forces, whose political direction was controlled by the Governor of the Cape as High Commissioner. It would have required much more tact and discretion than were possessed by either Sir Bartle Frere or Mr. Molteno to prevent friction arising in the difficult conditions of 1877–8, when local unrest in the Cape coincided with the menace of a Zulu war. The Governor went so far as to claim the inherent right, as Commander-in-Chief in the colony, to place the colonial forces under the control of the Imperial forces, a doctrine for which there was no possible warrant.

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The Prime Minister, on the other hand, decided to treat the Governor as a cipher and to dispose of the local force without even letting him know. Neither attitude can be defended, and the impasse was solved by a strictly constitutional step on the part of the Governor. Unable to induce his Ministers to accept his views, he compelled them to vacate office, and his action was approved by the new Ministry which accepted his offer of portfolios and defended him successfully in Parliament. No difficulty arose in the far more vital case of the Boer war in 1899–1902; in the Cape and in Natal the local forces were placed unhesitatingly under the supreme control of the Imperial forces.

Towards the whole of the Dominion organisation the attitude of the Imperial Government was purely advisory. Neither Lord Dundonald nor Major-General Hutton received any support from the War Office against the decisions of the Canadian and Australian Governments hostile to their views. But advice was freely at the disposal of the colonies if they cared to have it, and the Colonial Defence Committee was organised in 1885 to serve this end. It was followed in 1901 by the creation by Mr. Balfour of the Imperial Defence Committee,[1] to which the former body became subordinate in 1904. The constitution of the Imperial Defence Committee was deliberately made absolutely elastic, so as to permit of the attendance as members of Dominion Ministers or other representatives when matters of interest to the Dominions were under consideration. Under its aegis there grew up the territorial force and the expeditionary army, which

[1] For its value to the Dominions see Lord Balfour and Lord Haldane, House of Lords, June 16, 1926.

was to render such excellent service to Europe in 1914. More immediately of importance to the Dominions was the creation of the Imperial General Staff in September 1906. Its purpose was fully explained by Mr. Haldane at the Colonial Conference of 1907, when he stressed the fact that there was no idea of seeking to press advice as to defence on the Dominions. On the other hand, it was clear that it would be desirable that each part of the Empire should organise for self-defence, and for the grant of aid to the rest of the Empire if the occasion should arise. The Conference affirmed the doctrine of the absolute autonomy of the Dominions, and, subject thereto, agreed that it was desirable to set up an Imperial General Staff on which officers from various parts of the Empire should serve. Its functions were declared to be the study of military science in all its branches,[1] the collection and dissemination of information and intelligence, the preparation of defence schemes on a common basis, and, at the request of any Dominion, the giving of advice as to the training, education, and war organisation of Dominion forces. The plan accepted further contemplated the free use of the Imperial Defence Committee for consultation on issues of common concern, and the creation in each Dominion of a section corresponding to the General Staff in England, which should be entirely autonomous but should be free to consult with the Imperial General Staff. The whole scheme was devised to obviate the errors of organisation in the past. It was hoped thus to secure that there should be effective co-operation in all aspects of military organisation, training, and equip-

[1] An Imperial Defence College was created in 1926 and facilities therein have been offered to the Dominions.

ment between the Dominions and the United Kingdom, while the control of each Dominion would be absolute and unquestionable.

The proposals of 1907 were slowly carried into effect. They were further developed at the Naval and Military Conference of 1909, summoned in view of the menacing situation in Europe, when the Chief of the Imperial General Staff submitted to the experts from the Dominions his proposals for organising the forces of the Empire for co-operation during war. In 1912 a Dominion section of the General Staff was established at the War Office, Australia and New Zealand sending officers; while, as the outcome of the Imperial Conference of 1911, improved arrangements were made for the attachment of Dominion officers to the Staff Colleges at Camberley and Quetta for further training.

The Dominions, under these arrangements, were always regarded as prepared to secure their own defence from internal disorder and to assist in their protection against invasion, but no obligation to aid in the wars of the United Kingdom was ever deemed to exist. Possibly the position was illogical; in view of the benefits bestowed on the colonies by the British connexion, aid in war might have been relied upon, but this idea was not accepted, and all aid which was given was purely voluntary. Thus Canadian voyageurs were employed in the Gordon Relief Expedition, and New South Wales sent a force to Egypt after the fall of Khartum. Co-operation on a substantial scale was seen in the South African war; Canada supplied 8400 men, including a garrison to relieve the British force at Halifax, Australia and New Zealand supplied 16,000 and 6000 respectively, while South Africa, the scene of hostilities,

afforded 52,000. In this case, no doubt, aid was imperative, for the duty of a colony to assist in its own defence was never challenged, and both the Cape and Natal were subjected to invasion. The rule that all help should be voluntary was clearly reflected in the legislation of the Dominions, which imposed no obligation on their militia for overseas service. The question of the control of troops when serving voluntarily overseas was simple enough. The Army Act[1] of the Imperial Parliament provided that the colonial laws governing their forces should have extra-territorial application; if the Acts were silent and the colonial forces were actually serving with Imperial forces, then the Army Act would apply. The autonomy of the Dominions was thus fully respected, but to make it even more complete the Commonwealth and New Zealand in their Acts of 1909 expressly provided for the application of the Army Act to their forces if serving abroad. Canada and the Commonwealth further authorised the placing of the local forces, if deemed desirable by the Governor-General in Council, under the control of the officer commanding the Imperial forces in the event of the two forces being engaged in service in the Dominion. The system was completed by the enactment of provisions both in the United Kingdom and the Dominions to secure that officers lent for service under any government should for the time being fall under the law applicable to the force in which he was for the time being engaged. In point of fact actual service, whether in Egypt or South Africa, was carried out under the Army Act. The only difficulty that arose was the question whether sufficient provision existed for the maintenance of discipline on

[1] 44 & 45 Vict. c. 58, s. 177.

board the ships conveying the forces to and from their homes, and this point was met by the issue in 1909 of warrants to the Governors-General authorising the grant of warrants permitting the officer in command of Dominion forces, embarked *en route* for the United Kingdom, to convene and confirm the proceedings of district courts-martial under the Army Act. The Governor-General himself was permitted to act similarly in regard to general courts-martial, if these were necessary to punish in a Dominion offences committed by persons enlisted in a Dominion under the Army Act, or enlisted under a local Act, but serving under the Army Act.

These principles were effectively put into force when the European war of 1914 evoked spontaneous offers of aid from all the Dominions. The Canadian forces were raised under the Army Act, though this was questioned, and they were in the main trained in the United Kingdom. They were placed under the command of Imperial officers, until, on Sir Julian Byng's promotion after the battle of Vimy Ridge, the command of the Canadian forces was given to Sir Arthur Currie, whose merit had raised him to the command of a division. The vast mass of business connected with the civil aspects of the force were placed under the charge of a Minister for Militia Overseas, with headquarters at London. The steady growth of the forces resulted in the creation in April 1918 of an Overseas Military Council, presided over by Sir E. Kemp as responsible Minister, which soon decided to ask for further control on behalf of Canada over the troops in France; its authority over those in England proved sufficient without substantial change. Sir Robert Borden took up

the matter at the Imperial War Cabinet, with the result that substantial concessions were made. The organisation of the forces was made independent save for the supreme authority of the British Commander-in-Chief and the French Generalissimo, Marshal Foch. A Canadian section was created at General Headquarters with authority over the various Canadian administrative services and departments in the field, and empowered to supervise the taking of such administrative action as might be decided upon respecting the personnel of the forces. It was determined also to create a separate Canadian Air Force, but this project was rendered needless by the armistice.

The same principle of Canadian control was exemplified in a complete form by the attitude taken by the Government in regard to the maintenance of the strength of the forces in the field. The Imperial Government did not attempt to ask for any increase of Canada's efforts, and the decision that they must be intensified was freely taken by Sir R. Borden after his learning at the meetings of the Imperial War Cabinet of the dangerous position of the war. The steps taken to secure a coalition pledged to enforce conscription led to the passing of a measure in 1917 for that purpose, but the actual effect of the legislation was minimised by the vehement objections raised and the numbers of exceptions granted by the tribunals established under the Act. None the less, the contribution to the allied cause was 418,000 men sent overseas, with 51,000 deaths. These figures explain the high measure of authority which Canada was able to maintain over her forces. The whole corps was kept together, and a proposal to despatch a portion of it to Italy was

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negated, while a later effort to divide it into six divisions was foiled by Sir A. Currie, who appreciated the importance of having under him four divisions at full strength in lieu of the depleted forces of the British army proper.

The other Dominions lent equally invaluable assistance, but their forces did not attain the autonomy of those of Canada.[1] The Government of the Commonwealth unhappily faltered in its policy; although Mr. Hughes gained, as did Sir R. Borden, the conviction that conscription was necessary, he lacked the courage to put his fortunes to the decision of a general election fought on this point and resorted instead to the futile expedient of a referendum, which failed, as was inevitable, to give the desired approval to conscription. From this error the policy of the Government never recovered; Mr. Hughes was able to relieve himself of his Labour colleagues and to form a coalition Government which obtained a popular verdict at the elections. But no mandate for conscription was demanded, and another referendum resulted in the women's vote declaring against compulsion. The Ministry unhappily preferred to remain in office without the authority necessary for the reinforcement of the troops, whose heavy casualties, 59,000 out of 332,000 sent overseas, attested the undue strain placed on their headlong gallantry. New Zealand was more fortunate; the justice of compulsion was recognised in 1916 and the necessary legislation evoked little objection. The force, accordingly, was well maintained; over 100,000 went overseas, and 17,000 died. Newfoundland, which, since the withdrawal of the Imperial forces in 1871, had

[1] Australian disciplinary penalties were less drastic than British.

been without any military organisation, first created a volunteer force and then in 1918 adopted compulsion; its losses were enormous—over 1200 out of not quite 5000 men.

The record of South Africa was chequered.[1] General Botha hastened to relieve the British Government of the necessity of maintaining the garrison troops, but his readiness to undertake the invasion of German South-West Africa led to the deplorable rebellion of malcontent Boers. Treachery marked the outbreak of the revolt, and the only redeeming feature in the episode was the brilliant management of the campaign of repression by Generals Botha and Smuts, and the loyalty of a large number of the Boers, who recognised that they had definitely accepted the British connexion and who were not prepared to take advantage of British difficulties to renounce their sworn allegiance. The strength of the Union was thereafter devoted in part to the reduction of South-West Africa, which was effected with much skill and at small cost; in part to the campaign in East Africa, where the use by the German Commander of trained native forces and the difficulties of transport tried hardly the resources of General Smuts. His action in taking over the command-in-chief was followed by his services as an extraordinary member of the Imperial War Cabinet. In this position he did not represent, officially, South Africa, but acted as an independent expert. Considerable numbers of South Africans proceeded overseas and served on the western front or in Egypt.

The close of the war was followed by a rapid return in Canada to the old scale of defence preparation. The

[1] Keith, *War Government of the British Dominions*, pp. 112-28.

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permanent militia, with a maximum enrolment of 10,000, is under 4000 in strength; the training of the non-permanent militia, which by law may extend to thirty days a year, is normally curtailed to some nine days, on score of expense; but cadet training has grown in importance, despite pacifist protests from western members of the House of Commons. Chiefly from motives of economy, in 1922 a Ministry of National Defence was created to exercise control over all branches of defence; the Minister is aided by a Defence Council. But the essential principle governing Canadian policy is the security of the Dominion from foreign aggression, as a result of the protection accorded by the British fleet, and even more completely perhaps by the Monroe Doctrine, which negatives any attempt by a foreign Power to obtain possession of Canadian territory. Danger from the United States is wisely ignored as a possibility, and the frontier remains unguarded, while on the Great Lakes neither Power maintains serious armaments, though the Rush-Bagot agreement of 1817 is not observed precisely to the letter.

Even in Australia the result of the war was to weaken the case for compulsory training as a general principle. The Labour Party had been driven to adopt an attitude of disapproval of compulsion, and as a compromise the post-war policy has been to restrict training to the more thickly populated centres and to limit it in duration. Senior cadets are trained only at age 17, and members of the Citizen Force for three years up to age 21; the result is, therefore, that no voter is subjected to compulsion. On the other hand, the organisation of the forces has been improved since the war by the creation in 1921 of a Ministry of De-

fence. The Minister is advised by three Boards concerned with Military, Naval, and Air Defence, while co-ordination of policy is effected primarily by the Defence Standing Committee, which has been created on the model of the Chiefs of Staff Sub-Committee of the Imperial Defence Committee. Corresponding in function to that body is the Council of Defence, presided over by the Prime Minister; it has advisory functions only, and its advice may, like that of its prototype, be rejected by the Cabinet, to which it reports. In New Zealand, also, compulsory training has been reduced since the war, and youths are only trained for three years, being released when attaining the age of 21. As in the other Dominions, there is but one Minister of Defence, and the responsible adviser for the military forces is a General Officer Commanding, aided by General Headquarters.

In South Africa the war brought about one important change. The Union Government at its close offered to relieve the Imperial Government of the burden of maintaining any garrisons, and on December 1, 1921, therefore, the South African Military Command was abolished and the Imperial property used for defence purposes was formally handed over to the Union on agreed terms. The system of training in practice on a voluntary basis has been continued, but the cost involved has induced the Government to abandon any idea of carrying out the full scheme originally contemplated in 1912. But, on the other hand, there has been a marked development of the Air Force, and a revival of the old commando system, in order to extend training more widely among the Dutch elements of the population as opposed to the more thickly populated

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centres. The supreme control rests with the Minister of Defence, who may be advised by a Defence Council, and who also for military matters can consult a Military Board. The Defence Act contemplates the employment of the forces for the defence of the Union either in that territory or in any other part of South Africa, while the mandated territory of South-West Africa has a burgher force of its own. In the case of Canada also, the Acts contemplate the possibility of service outside Canada but for the defence of the Dominion; but in Australia and New Zealand the Acts impose liability for service only within Australia or New Zealand.

The war saw the creation of an Irish army utterly illegal and raised for the purpose of overthrowing the British régime. The treaty of 1921, however, converted it into the legitimate means of defence of the new State, and it was formally organised in 1923, while a year later a Council of Defence was set up to advise the Minister of Defence. After some vacillation, the rôle of the army has been steadily reduced in importance. As late as 1926 it was contemplated that it should be maintained on the basis that it should be able not merely to repress disruptive tendencies but to protect Irish neutrality and to repel invasion. But under pressure of economic considerations the purpose of the force has steadily tended to the minor function of safeguarding internal order. It has, in fact, been recognised that the resources of the Free State forbid the maintenance of any force sufficient for the serious defence of the country against invasion, which must be the business of the United Kingdom. Since the Imperial Conference of 1926, the Government has more and

more frankly admitted that it is prepared to discuss with the United Kingdom the steps necessary to secure effective defence, an attitude naturally resented by the Republicans in the Dail, who deplore the conversion of the force which fought against the United Kingdom into a possible subsidiary element in a British army protecting Ireland from invasion.[1]

An interesting outcome of the criticisms of the tendency to association with the United Kingdom was seen in October 1928, when the Minister for Defence explained his Estimates. He indicated an ultimate intention of fixing the army at 5000, comprising technical branches, artillery, air, transport, highly trained to afford facilities for expansion. It should be able to prevent disorder, as in 1922 it had reduced the Republicans to talk, and would render any foreign Power reluctant to make the Free State the scene of military operations. Stress was laid on the advantages to be derived from the despatch of a military mission to the United States, and from the creation of a Military College at the Curragh; while it was, doubtless truthfully, denied that any agreement existed as to the maintenance of uniformity in equipment with the United Kingdom. It must be added that the Minister was careful not to assert that in fact he was not adopting British patterns, nor that his purchases were not usually made from Woolwich Arsenal. He was emphatic that no plans had been made for service overseas. The nature of the criticisms of his policy may be gathered from those of Mr. Hogan, a Labour member. He was inclined to regard the army as a national danger; certain ports of the country were held by a

[1] D. Gwynn, *The Irish Free State*, chap. xii.

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foreign State, and another foreign State might attack them, with the result that if the Free State sought to defend its own territory it might render itself liable to attack.

The Air Forces of the Dominions have, not unnaturally, developed rather in the direction of civil aviation than for warlike ends. The Canadian Air Force comprises a small permanent active air force and a still smaller non-permanent active force and a reserve, but the chief interest of the Government has been devoted to the development of civil aviation, which is of very great importance for survey work, for watching the great forest areas in order to detect and aid in fighting fires, and for patrol and other work in the northern areas. In Australia there are a small permanent force and a citizen air force, under the control of an Air Board, subordinate to the Minister for Defence. He controls also the branch of civil aviation, while private companies receive governmental subsidies to carry out several important air mail services. New Zealand likewise has a permanent and a territorial air force under the Defence Department, which undertakes survey work for municipal and other authorities. The South African Air Force comprises an aircraft depot, a flying training depot, and one service squadron of three flights; its immediate military purpose is the prevention of disorder, and from its headquarters at Pretoria any part of the Union can be reached in a day. Aircraft figured in the ruthless repression of the disorder in South-West Africa in 1922, which excited the disapproval of the League Mandates Commission.

All these forces are under the sole control of the Governments concerned. The only constitutional issue

concerning them arises from the question of the legal power to control them when outside territorial limits, but this appears to be sufficiently covered by the adoption[1] of the same principles as those of the Army Act in their application to Dominion forces. In the case of South Africa, co-operation between aeroplanes of the local and of the Imperial forces in planning routes in order to facilitate the establishment of the air mail service from London to Cape Town has been carried out to some extent, involving flights by the local aeroplanes far beyond Union limits, and there may be a similar development as regards Australia when the air service to India is further extended. More remote is the prospect of Dominion airships, though Canada, the Union, and Australia have all co-operated with the British experiments by providing facilities for the landing of the experimental airships.

There seems no reason to suppose that it is desired by any Dominion to claim any legislative control over British military aircraft when within their territorial limits, but, of course, Dominion Acts as to air navigation apply to such craft, save in so far as they may be directly repugnant to the Imperial air legislation.

[1] See the Air Force (Constitution) Act, 1917.

CHAPTER VII

NAVAL DEFENCE

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WHILE the colonies early achieved control of their own military forces, they for long neither desired nor received any authority in the matter of naval forces. The advantages to the colonies of enjoying the protection of the British Navy without incurring expenditure were obvious, while to the British Government there was always present the risk of complications if any colony owned a naval force and claimed independent control. The risk of conflicts on land frontiers between colonial and foreign forces had been alleged by Lord John Russell as a ground for negating the theory of responsible government in 1839, and still more ominous was the outlook if a colony were to employ armed vessels free from Imperial control to enforce, for example, its interpretation of fishery treaties. Hence, whenever armed protection seemed requisite either in the case of Canada or Newfoundland, the British Government desired that it should be supplied by ships of the British Navy, securely under the control of the Admiralty and the Foreign Office. Nor was the desire for autonomy in this regard strong enough to conquer the aversion of Canada to payment for defence.

In Australia the case was somewhat different. There were no treaty rights enjoyed by foreigners in Australasian waters which rendered Imperial patrols advisable, and the enormous length of the Australian coast prevented an attempt at the constant presence of British ships. It was natural, therefore, that uneasy feelings as to defencelessness should from time to time be dominant in the colonies, and that, as they grew in wealth, tentative suggestions should be made for the creation of local naval flotillas intended essentially for coast protection. The British Government was somewhat doubtful even as to so limited a project, but at last the desire of the colonies was conceded, and an Act of 1865 authorised colonial Governments to maintain vessels of war and to raise bodies of volunteers for service on such ships or in the Royal Naval Reserve.[1] Provision was made to meet the inability of colonial Legislatures to legislate to govern the control of their war vessels on the high seas. It was provided that beyond colonial territorial limits the ships would fall under the régime applicable to ships of the Royal Navy. Moreover, power was given to the Admiralty to accept offers by any colony of ships and men, in which event the regulations of the Royal Navy would apply to them. To the vessels raised by the colonies under the Act there was assigned the Blue Ensign with the Blue Pendant as a mark of their status as ships of war, and due notification was given to foreign States that vessels flying the flag should be treated as possessing the full status of British ships of war. Thus the Imperial Government asserted its sole right to confer on colonial ships the status of war vessels and to obtain recognition

[1] Keith, *Responsible Government in the Dominions*, Part V. chap. x.

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of that status from foreign Powers. A certain activity under this Act was seen from 1884 onwards, for the fear of war with Russia in 1877–8 had caused Australia to contemplate with horror the possibility of Russian cruisers raiding the coastal towns and holding them up to ransom in the manner deemed lawful by Admiral Aube and other distinguished naval officers. A more serious effort, however, to secure improved protection took place at the Colonial Conference of 1887. The Admiralty was not prepared to supply for the Australasian station a fleet of the size demanded by the colonies, unless they were willing to pay a subsidy to recoup the Admiralty for expenditure which, from a strategic point of view, was needless. This system of a subsidised fleet was renewed in 1897, and again at the Conference of 1902; but the reception accorded to Sir E. Barton on his return to the Commonwealth, when he asked for Parliamentary approval of the renewed agreement, showed that Australia had outlived the period of subsidies. Mr. Higgins declared roundly that the payment of a subsidy could not be justified under the terms of the Constitution, and it was only with great efforts that the necessary legislation to continue the arrangement and to provide for the subsidy was carried.

The true policy of the Commonwealth was now declared by Mr. Deakin to consist in the development of a force under her sovereign authority. It was admitted that in the past there had been serious doubt of the power of any colony to keep up a navy save under the conditions laid down in the Act of 1865, which still governed the rather obsolete vessels taken over by the Commonwealth from the States on its

formation. It was clear that the Commonwealth would not be willing to work under the Act, and Mr. Deakin forcibly contended that the Constitution gave powers sufficiently to justify the extra-territorial control of her ships of war by the Commonwealth. The claim rested not merely on the implications to be deduced from the power to legislate as to defence, which must carry with it, by necessary implication, authority to exercise extra-territorial authority, but on the terms of Section 5 of the Commonwealth Constitution Act. That clause declared the laws of the Commonwealth to be in force on all ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination were in the Commonwealth; and this description would fit Australian war vessels. There was an obvious difficulty, for it might be held that the term "Queen's ships of war" covered any war vessels of the Commonwealth, but it was certainly plausible to argue that the phrase covered only the Imperial Navy, and had no reference to colonial naval forces. The Admiralty, however, felt difficulties. It was not so much concerned with the technical legal difficulties affecting the ships of the Commonwealth, but with their control in peace and war alike. In its opinion, it was essential that the ships should at all times be under its control. In vain did Mr. Deakin at the Colonial Conference of 1907 press upon the Admiralty the aspirations of the Commonwealth for control of her ships and her objections to mere subsidies. The only result in 1908 was a half-hearted proposal by the Admiralty for the creation of an Australian flotilla of submarines and destroyers, which might remain under Australian control within Australian waters, but even in peace should pass

under Admiralty control beyond these limits, while in time of war the force should at once be transferred to complete Admiralty control. At the same time, the merits of the subsidy system still appealed to New Zealand, which by a spontaneous act, greatly appreciated in the United Kingdom, increased to £100,000 a year her contribution towards the cost of the Australian squadron.

The matter only took on a new aspect in 1909 on the revelation of the great dangers which were being run of the outbreak of a European war. New Zealand offered a Dreadnought to the Admiralty, and New South Wales and Victoria, indignant at the failure of the Labour Government in the Commonwealth to come forward with a similar offer, declared their willingness to make presentations to the British Navy. The outcome was the Naval and Military Conference of 1909, which achieved general agreement, and which conceded in large measure the desire of the Commonwealth for the recognition of its sovereignty in the sphere of naval defence. New Zealand did not desire to have an independent fleet unit, but Canada and Australia were to create such units, which would be supplemented by units of the Royal Navy in the East Indies and in Chinese waters. Action was taken in 1910 in both Canada and Australia, it being assumed in either case that the power to legislate for defence included the right to regulate Australian or Canadian ships beyond territorial limits. The Canadian Act authorised the Governor in Council in case of emergency to place the ships and men under the Admiralty, in which event Parliament, if not in session, must be summoned within fifteen days. A similar provision was made in the

Australian Act, which further provided that, subject to any Imperial Act, in the event of joint operations between Imperial and Dominion forces, the command of the whole should devolve on the senior officer. In both cases the general Admiralty code was applied to the ships and men raised under the Acts, subject to such express changes as might be made.

The position, however, was still regarded by the Admiralty as confused, and the necessary rectification took place at the Imperial Conference of 1911, which succeeded in harmonising the views of all concerned. The style "Royal" was conferred on the Canadian and Australian Navies, and they were authorised to fly the White Ensign at the stern with the Dominion flag at the jack-staff. Definite stations were assigned to either navy and arrangements made for their visits to British possessions or foreign ports. In the latter case the Admiralty must be informed, with a view to the necessary steps being taken through the Foreign Office to obtain a due reception from the foreign Power. While in port, the commander must report to the officer commanding the station, or the Admiralty; and must accept the directions of the Foreign Office as to any incident of an international character occurring during his stay in the foreign harbour. Similar principles were to apply when a Dominion war vessel was compelled to put into a foreign port by stress or storm. In the event of British and Dominion vessels being together, the senior officer would assume command as regards ceremonial or international intercourse, or when joint action was agreed upon, but would have no power to direct the movements of the other vessel unless this was agreed upon as part of a co-operative action. Facilities for training

of Australian officers were to be provided, and for promotion purposes there was to be one common list in order of seniority, so that the new navies would be assured of obtaining the loan of the services of officers of high British qualifications. In the event of war, if the Dominion forces were placed under British control, as was confidently anticipated, though not made compulsory, the ships would be treated as being incorporated for the period of the transfer in the British Navy.

Legislation by the Imperial Parliament was deemed necessary for the purpose of making effective the new proposals, and opportunity was taken to remove all doubts as to the validity of the Dominion Acts, so far as they purported to have extra-territorial operation. It is, therefore, provided by the Naval Discipline (Dominion Naval Forces) Act, 1911, that the provisions of the Imperial Naval Discipline Act shall apply to Dominion naval forces to which they have been declared by local legislation to be applicable, subject to such changes as may have been made by the local Acts. Authority is also given to the King in Council to modify the Imperial Act in order to regulate the relations of the Dominion and the Imperial forces. At the same time, it was provided that the Act should only come into force as regards any Dominion upon legislation by that Dominion adopting the Act. The position of the Dominions was thus completely safeguarded. The Imperial Act could only affect them if they deliberately adopted it, and even then the Imperial rules of naval discipline applied to their ships only so far as they were not modified by local legislation. The only point obscure was whether the adoption of the Imperial Act could be withdrawn by a Dominion; the Act on this

score was silent, but it may be assumed that it was not intended to compel any Dominion to maintain adoption permanently if that course should, in its opinion, cease to be desirable.

The Dominions proceeded, if rather slowly, to accept the position offered. Australia moved with rapidity: the necessary adopting Act was passed in 1912, and an Imperial Order in Council was duly issued on August 12, 1913, while actual control of the new unit was assumed by the Naval Board of the Commonwealth on July 1. New Zealand, when the Australian Navy had become a *fait accompli*, similarly decided to adopt the policy of a local flotilla. The necessary legislation was passed in 1913, and the usual Order in Council was issued on July 16, 1914. South Africa, on the other hand, by the Defence Act, 1912, contemplated merely the formation of a South African Branch of the Royal Naval Volunteer Reserve, in continuation of the existing forces of this type in the Cape and Natal; and Newfoundland naturally persisted in restricting her activity to this form of development, for which her large naval population offered special facilities.

In Canada, however, the movement to create a fleet from the first fared badly. Sir Wilfrid Laurier in 1910 had to meet the combined onslaught of Mr. Monk, Mr. Bourassa, and Mr. Lavergne, who accused him of being party to the Imperialistic policy of the United Kingdom, and as pledging Canada to take part in every British war. Sir W. Laurier repudiated this gloss on his proposals, and absolutely denied any obligation to participate actively in all British wars. But Canada could not shut her eyes to the dangers of the world position, and she must be prepared to defend herself

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on sea as well as on land. Mr. Borden, as leader of the Opposition, adopted a different line of criticism. He had no objection to naval defence, but he derided the feeble Canadian naval proposals—which, indeed, were so modest as to be negligible—and held that a pecuniary payment should have been made pending the creation of a truly Imperial fleet. The Government, preoccupied shortly afterwards with its policy of reciprocity with the United States, was in no position to press on with its naval policy, even if it had the desire, which is more than doubtful. When, therefore, it was defeated at the general election of 1911 on its appeal to the electors to homologate its tariff proposals for reciprocity with the United States, Mr. Borden found no serious fleet in preparation. His visit to the United Kingdom to consult the Admiralty impressed upon him the urgency of contributing towards the Royal Navy as the one means of assisting the Admiralty to strengthen the fleet against the danger of war. He, therefore, on his return to the Dominion proposed the grant of 35,000,000 dollars as a subsidy to the Royal Navy. It was made clear that he had no desire to recommend this mode of action as a permanent policy, but that it was desired to surmount a grave emergency in which time was of the essence. The House of Commons, favourably impressed by the gravity and candour of his utterances, accepted the proposal by 114 to 84 votes, the minority being increased by the votes of several French Canadians; but the Senate, a nominated body, which had been sedulously filled with Liberal partisans, rejected the measure by 51 to 27. The result was that on the outbreak of war Australia alone of the Dominions had any substantial naval

force, including a battle cruiser and three cruisers, while New Zealand had one small cruiser and Canada two. In all cases the forces were at once placed under Imperial control. This was provided for automatically in the case of New Zealand by the Act of 1913; but Canada and Australia took the same step under the powers granted by their Acts, though *per incuriam* the formal Australian step was only taken on August 10, 1914. The brilliant services of Australia in the war on land were increased in value by the great aid thus afforded by her powerful fleet, which by its organisation was immediately adapted for effective co-operation with the British forces. Newfoundland gave the valuable services of her skilled fishermen, who performed marvellously as mine-sweepers.

It was natural that the Admiralty should be convinced by the experience of the war of the absolute necessity of unified control of the navy, and accordingly on May 17, 1918, an effort was made to induce the Dominion Prime Ministers to adopt the doctrine of a unified fleet. The reply of the Prime Ministers was largely inspired by Sir Robert Borden,[1] and it is well worthy of note as a reasoned declaration in favour of the doctrine of the autonomy of the Dominions and the absolute maintenance of their internal sovereignty. There was no attempt to deny the strength of the arguments in favour of a single fleet and unified control over it. It was conceded that there were great advantages in unity of construction, of equipment, and of armament; and that it was highly important to avoid discrepancies in modes of administration, of organisation, and of training. But it was held that experience

[1] *Canadian Constitutional Studies*, pp. 157, 158.

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in the case of the Australian fleet had shown that these things could, in fact, be attained without the sacrifice of Dominion control in time of peace, while in war it would doubtless be held desirable by the Dominions to transfer supreme authority to the Admiralty. It was, however, admitted that in the course of time it might become necessary to arrange for a truly Imperial authority, with Dominion representation, to exercise authority over an Imperial fleet, but the necessity of such action had not yet emerged. The reply of the Prime Ministers was of historic importance. It was returned at a time when, if ever, there might have been expected agreement on unity and when its advantages were most plainly obvious. On the other hand, these practical considerations were outweighed in the minds of the Ministers by the consciousness of the achievement of a higher national status by the great sacrifices made by the Dominions in the war, which was shortly to bear fruit in the demand for separate membership of the League of Nations. At the same time, Canada showed her readiness to co-operate, wherever this could be done without sacrifice of status. Hitherto no steps had been taken to give effect to the Imperial Act of 1911 regarding the legal control of Dominion naval forces. The handing over of the Canadian ships at the outset of the war had removed any serious legal difficulties, but the issue had now to be faced, if Canada were to proceed to reconstitute an independent naval unit. Accordingly, the necessary Act was passed in 1918, and, though pressure of more urgent issues prevented final action being taken at once, Imperial Orders in Council were issued on June 28, 1920, under which the whole system of the relations of the Imperial and the

Dominion navies was clearly defined. The legal system thus became effective, leaving the fullest autonomy but securing at the same time as much uniformity in the regulations and instructions governing the naval forces as was possible. The Dominion Governments and Parliaments are fully entitled, if they think fit, to depart, in respect of their forces, from the terms of the Naval Discipline Act, the King's Regulations for the Navy, and the Admiralty Instructions. But the doctrine adopted is that modifications should be introduced, when possible, only after full consultation between the naval authorities of the countries concerned. Moreover, the system of exchange of officers and men is an essential element in securing the development of the forces on a common basis. The advantages to the Dominions from this principle are enormous. Otherwise the local navies would unquestionably fail to acquire anything like the necessary amount of efficiency as the inevitable outcome of the limited training and practical experience which could be acquired in forces which, relative to the Imperial Navy, are almost negligible in size. When officers or men are thus serving under a Dominion Government, or when Dominion officers and men serve under the Admiralty, they fall for the period fully under the legal authority of the Government in whose service for the time being they are. The necessary Imperial Act for this purpose was passed in 1922.

Whatever might have been the outcome of the war in Dominion naval development if matters had proceeded on pre-war lines, the Washington Conference of 1921–2 called a halt to any idea of substantial naval progress in Canada, and postponed indefinitely serious

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expansion in the rest of the Empire. The change of tendency in Canada was seen still more markedly in 1922, when the Liberal Party secured power once more. The whole of its history told against any idea of naval construction; even Sir Wilfrid Laurier had been unable to obtain any concurrence in such a policy from French Canada, and Mr. Mackenzie King had no chance of succeeding in altering the stubborn objections of Quebec to anything suggesting participation in the wars of the Empire. The aegis of the Monroe Doctrine, now reinforced by the determination of the United States to secure a fleet on a parity with that of the United Kingdom, effectively preserved Canada from risk of oversea attack no less than the existence of the British fleet. Hence the naval preparations of the Dominion were reduced in 1923, and now consist mainly of the maintenance of a Royal Canadian Naval Reserve 500 strong, of a Volunteer Reserve of double that strength, and a couple of destroyers—happily, at last, of modern design—for training purposes. The barracks at Halifax and Esquimalt, which were handed over by the United Kingdom to Canadian care, are still preserved as training centres and depots. In complete consistency with this attitude, Canada remained absolutely neutral in 1923 when at the Imperial Conference there was mooted the plan of the Admiralty for the creation, at a cost of £11,000,000, of a naval base at Singapore to secure the protection of Australasia and of Empire interests in general. The Dominion would not admit that it had any interest in the scheme, and when the commander of the Special Service Squadron which visited Canadian waters in 1924, Vice-Admiral Sir F. Field, expressed strongly in his speeches in the

Dominion the view that Canada was failing in her duty of Imperial co-operation in defence, some indignation at his unconstitutional utterances was expressed in the Dominion Parliament. In vain also did Mr. Bruce, when returning home to Australia via the Dominion from the Imperial Conference of 1926, endeavour to impress on the people of Canada their duty to play a common part in the defence of the Empire. The Conference itself had failed to mark any advance towards co-operation in naval defence: though it had noted with benevolence the efforts of the British Government to establish the Singapore base, Canada was careful to refrain from homologating this approval, lest she should be deemed to have agreed to the implication that the whole of the Empire was interested in this effort of the United Kingdom to protect the trade routes, which are the mainspring of British commercial prosperity and that of the rest of the Empire.

In the case of Australia, the Washington Conference involved the destruction of the great battle cruiser *Australia*, and for a time the desire to develop naval strength seemed to be in abeyance. This mood, however, rapidly passed, and appreciation was aroused by the decision of the British Government to adopt the policy of the creation of the Singapore base. That project had, indeed, to face grave criticism from naval experts in the United Kingdom, who pointed out that it rested on the belief that naval warfare would continue to find a vital place for the use of battleships and battle cruisers, whereas these monster weapons of war had been shown to be obsolete and mere targets for submarines or aeroplanes. This view, however, had little vogue in the Commonwealth, and New Zealand went

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far beyond the vague promises of a contribution, which was all that Mr. Bruce could give. It is, however, clear that the project commanded little enthusiasm in Australia, for the decision of the Labour Government in the United Kingdom in 1924 to abandon the scheme was not deeply resented. Some weight was felt to attach to the argument that, while technically the proposal to create a great naval base was in no wise contrary to the Washington Treaty, whose terms had been so framed as to exclude Singapore from the area in which fortifications were not to be erected during the currency of the treaty, it none the less was not in harmony with the movement to disarmament to construct a fresh base, whose only probable use must be against Japan. The reversal of the Labour Government's attitude in 1925–6 was naturally greeted with satisfaction, but nothing came of Mr. Bruce's suggestion of Australian aid. On the contrary, he adopted the plan of increasing the strength of the Australian force by the construction of two cruisers of the maximum power permitted by the Washington Conference, of two submarines, and a seaplane carrier, and of subsidising the construction of a floating dock by the New South Wales Government. A supply of officers is secured by the operations of the Naval College at Jervis Bay, while training is provided for lads who desire a career in the navy, and a substantial Naval Reserve is constituted. New Zealand, for her part, has shown remarkable but not unprecedented generosity in her monetary contributions to the Singapore scheme.[1] Her naval service was reorganised in 1921; a Naval Board was set up in imitation of the Australian Board, and

[1] Mr. Coates on April 23, 1927, promised £1,000,000 in all.

the naval force was given the style of the New Zealand Division of the Royal Navy. In 1922 a Royal Naval Reserve was constituted, and in 1924 the *Dunedin*, an oil-burning cruiser of recent type, was obtained from the Imperial Government. The style adopted is a significant indication of the attitude of the Dominion. While autonomy in naval administration has been secured, it is an autonomy which gladly contemplates the immediate incorporation of the Dominion naval force with the Imperial force in time of war, while the grants to the cost of the Singapore base establish the Dominion's recognition of the justice of the rule that all parts of the Empire should share in the burden of their common defence.

The attitude of South Africa has, naturally enough, been very different. It is not, indeed, denied by General Hertzog that the safety of South African sea-borne trade, which is vital to her prosperity and wealth, depends on the protection of the British Navy. But the stereotyped reply is that the United Kingdom is equally interested in the security of communications and may as well pay the whole cost. The project of Singapore was frowned on in 1923 by General Smuts, who doubtless was influenced in part by doubt whether the proposals were in complete accord with the spirit of the Washington Conference, but who was also not unaware that to accept any responsibility for the scheme would have been suicidal. The naval defence of the Union, therefore, is left to the Imperial Government. The obligations of the Union are of minimal importance. When the tiny subsidy of £85,000 formerly paid to the Imperial Navy, in pursuance of the grants made by the Cape and Natal before union, was formally stopped in

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1921, it was withdrawn on the understanding that the Union would spend the sum saved on such useful objects as the provision of oil tanks, mine-sweeping, survey operations, and on the increase of the South African Division of the Royal Naval Volunteer Reserve. That force counts only five companies, and its ships comprise two mine-sweepers and a surveying sloop. The control of this force is, curiously enough, a matter on which there is a certain discrepancy in official declarations, which is an interesting example of the desire of the British Government to admit Dominion autonomy. The *Official Year Book* of the Union states that the units "are administered under the orders of the Commander-in-Chief, Africa Station, by the Commander, S.A. Division, whose headquarters are at Simonstown". But the War Office version of the relationship is admirably discreet: "The Naval Service of the Union is commanded by an officer of the rank of Commander, who administers it under the General Staff Section. The British Naval Commander-in-Chief, Africa Station, acts as adviser to the Union Government in naval matters." *De minimis non curat lex.*

In the case of the Irish Free State, the issue of the creation of a naval force and the extent of its authority have not yet been decided. The treaty of 1921 contemplates ultimate establishment of an Irish Navy for coast defence, but the general attitude of the Free State towards defence problems at the present moment and its financial needs for development suggest that economic grounds, if no other consideration, should long dictate reliance on the strength of the United Kingdom. There is perhaps something paradoxical in the fact that the two Dominions which most seek for autonomy should

be those which have least willingness to defend their coasts at their own expense.

One constitutional issue of more than passing importance has been raised as a result of the use made of H.M.A.S. *Brisbane* in China in 1925, in the operations then undertaken for the protection of the lives and property of British subjects. Party bitterness explains the attack made by the Labour Party on June 25 on the Government for allowing an Australian ship to take part in measures oppressive to the Chinese, with whom Australians desired to live in amity. The attack might have been more impressive had it not come from a Party which regards all Orientals with unconcealed contempt. Unfortunately, Mr. Hughes lent the complaint some support, but his case was impossible to defend. The vessels in question had been placed with the British unit in Chinese waters under the exchange system which is indispensable to the efficiency of the small Australian Navy. The proper reply to any critic was that transfer must mean parting with control, and that it would be impossible to carry out the system if the Commonwealth Government were to be entitled to intervene at any moment and to disapprove of the use to be made of the transferred vessel. Mr. Hughes tried to counter this conclusive argument by saying that a British vessel transferred to the Commonwealth would not be prepared to take hostile action save on direct authority from the Admiralty. Mr. Bruce declared that it was understood between the Governments that any hostile action by the transferred vessels would be confined to the protection of life and property of British subjects, and he reminded his audience of the obvious fact that there were many Australians in China

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who were entitled to the protection of Australia as well as of the Imperial Government. The episode is significant of the parochial view which can still be taken by politicians, and which must continue to interpose difficulties to the full development of inter-Imperial naval co-operation.

CHAPTER VIII

ECCLESIASTICAL QUESTIONS

THE decision to accord responsible government did not immediately affect the claim by the Crown to possess jurisdiction to erect, by virtue of the prerogative, bishoprics in the colonies. Such bishoprics had never been brought into existence in the days of the First Empire, largely because of Walpole's reluctance to do anything which would give trouble, and it was the belief of many excellent people that the lack of a State Church had contributed largely to the falling away of the American colonies from grace. Hence, care was taken, despite the difficulties created by the existence in Canada of a solid block of Catholics whose religion was assured to them, to create a bishopric of Nova Scotia in 1787 and to confer on it a definite jurisdiction over ecclesiastics; and a similar bishopric was created for Quebec in 1793, and the jurisdiction of these prelates was recognised by an Imperial Act of 1819. Happily, however, for the harmony of Imperial relations, it was ruled by the Law Officers of the Crown, in respect of the creation of a bishopric in Tasmania in 1842, that the Crown had no power under the prerogative to confer coercive jurisdiction, and, while it still remained the practice to create bishoprics by Letters Patent, the omission of any power to summon

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witnesses, or administer oaths, or inflict ecclesiastical penalties rendered the usage innocuous and raised no constitutional questions. The absence of power to enforce discipline naturally called for remedy, and it was recognised that this was matter for the local Legislatures, which proceeded to supply the Church of England with the requisite authority. In South Australia, on the other hand, it was preferred to rest the constitution of the Church on contract, and a consensual compact was entered into which governed the civil rights of the clergy and laymen *inter se*. Even in Canada, where Bishops had long been familiar features of the constitutional world, the movement for local autonomy became strong, and in 1856 the Legislature provided for the Bishops, clergy, and laity of the Church in Canada meeting in the dioceses to make regulations for the discipline of the Church, including the appointment and removal of officers; while authority was granted for meeting in Synod to frame a general constitution for the Church. The Act was duly allowed to become operative, the Crown thus resigning the doctrine which it once asserted in America: that the meeting of any ecclesiastical Synod could only be authorised by its command, and that even Dissenters [1] had no right thus to act without Royal sanction. The Act was supplemented in 1859, and then at the request of the Church a Metropolitan was appointed by Letters Patent in 1860–62. But the draftsman was, as usual, not an expert in constitutional law, and he conferred upon the Metropolitan powers to oust the jurisdiction of the Bishops. There was direct conflict between the Acts of Canada and the Royal Letters Patent. Fortunately, no

[1] Chalmers, *Opinions*, pp. 44-53.

constitutional issue was pressed. The Imperial Government admitted that a mistake had been made, and informed the Metropolitan that where the law differed from the Letters Patent, it was the former which prevailed.

It was left to South Africa to provide a *cause célèbre* and to produce a change in the practice of appointing colonial Bishops by Letters Patent. Dr. Colenso and his heretical views are now matters of slight interest in a world which has advanced in religious insight far beyond his standpoint, and if his theology was dubious, it may be confessed that the judgments delivered in the cases to which he gave rise are even more suspect. The issue was whether it was competent for the Crown to confer by Letters Patent on the Bishop of Cape Town metropolitan jurisdiction over the Bishop of Natal, and the Privy Council[1] ruled that such action was not competent, as when the jurisdiction was conferred Natal had received a Constitution. It had escaped the attention of that court that the rule which deprives the Crown of legislative power over a conquered colony such as Natal might properly be deemed to be applied only, under the principle laid down by Lord Mansfield in *Campbell* v. *Hall*,[2] to the case where a representative Legislature has been conceded; and in all probability the view taken by the Court of Natal,[3] which held that the Letters Patent were valid and effective in law, was the more sound. But the net result was by no means unsatisfactory. The opponents of Dr. Colenso were anxious

[1] *In re the Lord Bishop of Natal*, 3 Moo. P.C. (N.S.) 115; *Bishop of Cape Town* v. *Bishop of Natal*, L.R. 3 P.C. 1. See Keith, *Responsible Government in the Dominions*, Part VII. chap. i.

[2] 20 St. Tr. 239.

[3] *Bishop of Natal* v. *Green*, [1868] N.L.R. 138.

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to deprive him of his office and emoluments, but the Law Officers, when consulted, could think of no way to accomplish this end. The Archbishop of Canterbury had no jurisdiction over the Bishop, and the High Commission Court had been abolished; and to refer the issue to the Judicial Committee under the Imperial Act of 1844 would be improper, as being in the nature of an effort to re-create the High Commission Court. Hence the Bishop continued to enjoy his emoluments, and the Crown determined to create no more Bishops by Letters Patent, thus removing the last possibility of friction with any colonial Government. The result has been that the Church in the Dominions has divested itself amicably and satisfactorily of any dependence on the Church of England, with which it enjoys communion. The maintenance of closer ties would have been a deplorable error, and it is a symptom of the value of separation as preserving real union in feeling that the determination to strengthen the autonomy of the Church in India has been taken simultaneously with the movement to secure a measure of responsible government.

The Imperial Government was also wise in not attempting to dictate to the colonies regarding Church endowments. The famous controversy in Upper Canada over the clergy reserves was left unsettled by the Constitution of 1840, and the reluctance of the Crown to consent to the abandonment of the principle of endowment continued for several years after the grant of responsible government. In 1852 the Conservative Ministry was unwilling to defer to the wishes of the Canadian Parliament for permission to abolish the reserves, but in the next year the new Government

readily conceded the Canadian demand, and the Parliament proceeded in 1854 to secularise them, after making provision for the life interests of persons already enjoying revenues from them. It is curious that this step was taken side by side with the continued enjoyment by the Roman Catholic Church of its revenues in Quebec from members of that denomination, and that the funds secularised were handed over to the municipalities and not even earmarked for education as was once contemplated. The Imperial Government still believed in the advantages of endowment, and the Constitutions of New South Wales, Victoria, and Tasmania under responsible government included grants for religion; but South Australia made no such provision, and the Imperial Government made no serious resistance to the almost immediate action taken in New South Wales to abolish the system, which was soon generally abandoned. It never prevailed in New Zealand, and it was not adopted either in Western Australia in 1890 or in Natal in 1893, when responsible government was conceded. The Cape terminated payments, in accordance with an Act of 1875, shortly after the attainment of self-government. There can be no doubt of the wisdom of the surrender of control by the Imperial Government. The predominance of one Church which justified the system of establishment and endowment in England and Scotland was utterly unknown in the colonies other than Quebec, and, in the days before responsible government was granted, serious friction had often been raised by the favour shown to the Church of England. It followed, therefore, that the grant of autonomy carried with it inevitably the end of the régime of special privilege for that Church, and

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it was generally felt impracticable, even if desirable, to substitute a system of proportional endowment. The exception of Quebec remains, nor is there the slightest reason to anticipate at any early date a change in policy in that province. The subservience of its Government from time to time to Papal influence has been the subject of resentment in Canada, but the Imperial Government has fortunately been saved from any implication in these issues by the federal Constitution, which accords to the central Government, and not to the British Government, the control of provincial legislation. The advantage of this condition of affairs was seen in 1888, when an ultramontane Ministry secured from the Legislature of the province an Act refunding to the Jesuits the property of which they were deprived on the cession of Canada to the British Crown. It was, of course, clearly impossible for the Dominion Government to disallow the Act,[1] however little it liked it, but the episode told decidedly against the Conservative Ministry in the country. In 1895 the result of religious feeling in the province, inspired by the decision of Manitoba to alter her school system and to eliminate special schools for Roman Catholic children, was to drive the Administration to ruin and defeat at the polls as the outcome of a vain effort to coerce Manitoba into a reversal of policy. Unfortunately, the racial and religious issues which were stilled in large measure during the Premiership of Sir Wilfrid Laurier were revived in a considerable measure during the war period, in part by the educational policy of Ontario in its discouragement of the use of the French language,

[1] *Selected Speeches and Documents on British Colonial Policy*, ii. 84-91.

and Imperial interests suffered from the opposition of the clerical influence to the policy of conscription and of active aid to the Empire in the war.

Curiously enough, it has been necessary in the case of the latest added of the Dominions to revive a control which had seemed wholly obsolete. The separation of the two elements in Ireland by the creation of distinct Governments brought with it the certainty that there would be considerable Protestant and Roman Catholic minorities in the Irish Free State and in Northern Ireland respectively, and it was held essential to secure rights in some measure for these minorities. Protection had been duly provided in the Government of Ireland Act, 1920, and it was insisted upon in the treaty of 1921. Under Article 16 it is provided that neither Northern Ireland nor the Free State can prohibit or endow any religion, or give any preference, or impose any disability on religious grounds, or prejudice the right of a child to attend a school receiving public money without attending religious instruction. No discrimination can be made as regards State aid between schools of different denominations, and property cannot be diverted from any religious denomination or educational endowment except for public utility purposes and on payment of compensation. It is probably fortunate that the arrangement has been made, though it has been difficult to legislate effectively in Northern Ireland for the control of education in part, as a result of doubts as to the extent of the limitations implied. But the mere existence of the clause is a safeguard against imprudent pressure being brought to bear on the Free State to compel it to undertake the burden of ecclesiastical endowments.

PART II

THE EXTENT AND LIMITS OF INTERNAL SOVEREIGNTY

CHAPTER IX

AUTONOMY AND SECESSION

It has been seen that the progress of the Dominions from the status of colonial dependency to the widest autonomy has been rapid and uninterrupted. No colony which has once received the boon of responsible government has ever been prepared to abandon it. Even amid the disturbed and anxious conditions which beset the Cape during and immediately after the Boer war, there was never anything in the nature of a majority of serious politicians in favour of the expedient of suspending the constitution which found favour with Lord Milner.[1] Even in his plan, it must be remembered, there was no idea of any permanent reduction of the status of the Cape. It was merely hoped that the change of Government for the time would assist in the bringing about of federation, so that the Cape would have resumed self-government in the capacity of member of a greater whole. At times of distress, financial and economic, some pessimists in Newfoundland have talked of the possibility of the need of approaching the Imperial Government with a request to take over control, but the fit of depression has always passed away, and the islanders, if admittedly they do

[1] E. A. Walker, *De Villiers*, p. 393.

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not always manage well their domestic affairs, are at least happier under their own régime than they would be if they handed over charge to others.

It is natural to ask whether there is any end to the increase of autonomy, and there is no doubt a tendency to hold that, as the outcome of the Imperial Conference of 1926, the only connexion between the parts of the Empire is the person of the King. This is the view frankly adopted by Professor Smiddy,[1] the first Irish Minister to the United States, who claims that "the only bond linking together the various nations of the British Commonwealth of Nations is the British Crown, or one might say, the person of the King". From this view dissent is expressed by Sir Cecil Hurst,[2] who asserts that "the British Empire is not a personal union. It is linked together by more than the accidental fact that it has the same individual as monarch for all the communities of which it consists. The fact that they all have the same individual as monarch is not accidental." Or again: "It is the Crown and the common citizenship which flows from allegiance to the Crown which constitute the links which bind the Empire together."

The issue thus presented can be considered from the point of view either of external or internal sovereignty, and here we may confine examination to the latter aspect.[3] There is, it is clear, no essential connexion between the two questions. It might be held that the Dominions and the United Kingdom were connected by a union which made them a single entity in inter-

[1] *Great Britain and the Dominions*, p. 117.

[2] *Ibid.* pp. 50-55. *Cf.* Keith, *Journal of Comparative Legislation*, 1928, pp. 326, 327.

[3] On external sovereignty, see Chap. XIX.

national law, and yet that in all matters of internal affairs each possessed absolute autonomy and owed no subordination to another. The only criterion of value is simply the examination of the actual bonds at present existing between the United Kingdom and the Dominions, and even a comparatively brief investigation must show that the views of Professor Smiddy and Sir C. Hurst are distinctly inadequate. If the view is accepted that the only link in the Empire is the person of the King, it would follow that there existed complete autonomy between every part of the Empire, and no doubt for this view can be cited the doctrine of the Imperial Conference of 1926, that the United Kingdom and the Dominions are "autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown and freely associated as members of the British Commonwealth of Nations". Nor does it seem from this declaration that the position is in any way altered by insisting, as does Sir C. Hurst, on the common citizenship as an element, seeing that it is admitted merely to flow from the common allegiance. It is surely impossible to found on common citizenship any limitation on internal autonomy, and it is entirely contrary to the history of England to base limitations on citizenship of this kind. From the accession of James I. to the English throne, all Scotsmen born after that date became, according to the famous judgment in Calvin's case,[1] natural-born English subjects as well as Scottish subjects of the King, but the internal affairs of the two kingdoms

[1] 7 Coke Rep. 17.

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remained wholly separated until the Union of 1707. The accession of the House of Hanover caused Hanoverians to be natural-born British subjects[1] until on Queen Victoria's accession that Union ceased, but the internal affairs of the two countries were absolutely unaffected by the common citizenship of the peoples.

The obvious fact is, that the expressions used in the Report are descriptive of a state of affairs which may be the outcome of the present Constitution of the Empire, and may be the ideal to which it ought to aspire, but which is not the present Constitution. The Report itself concedes in terms that "the principles of equality and similarity, appropriate to status, do not universally extend to function", and it is obvious that this concession is destructive of the virtue of the general declaration. The importance of the qualification was unhappily obscured by the admittedly erroneous decision to put the main proposition in italics and to deny the saving clause the same honour. It is certainly unfortunate that the mistake should have been allowed to occur, for, as Lord Balfour frankly admitted at Edinburgh, the same value attaches to both. The Report equally rests on both assertions, and, in fact, it is merely due to the second that it can be made to harmonise with the facts of the present Constitution. The essential position is that, under the mode in which the Empire functions, the autonomy of the Dominions, wide and important as it is, is subject to certain definite limitations. When the framers of the Report passed from the general aspect of the question, they were at once confronted by the formidable difficulties involved in seeking to apply their conception to con-

[1] (1886) 17 Q.B.D. 54.

crete situations, and the substance of the Report when it leaves the field of first principles amounts in effect to a confession that the application of the doctrines thus enunciated must be the work of the future. Nor is it in the least necessary to criticise this decision. The issues raised are indeed fundamental, and the mere statement will avail to show how hard it is to suggest an ideal solution.

The Report asserts that the Dominions are autonomous and freely associated in the British Commonwealth of Nations, and it is a natural deduction which has often been made by foreign jurists that the Report intends to concede the existence of the right of secession. It is indeed possible to contend that, though the association is free, the right to withdraw from association is not; so the original association of the United States was free, but when the attempt was made to exercise the right of secession, it was successfully resisted by the other States. It is, however, impossible to accept this rendering of the assertion of the Report. It is, of course, clear as a matter of history that the association of the Dominions with the United Kingdom has not been a voluntary one; no more convincing instance can be adduced than the case of the Irish Free State. Not the most optimistic computation would reckon the majority of the people of Ireland in 1926 as really desiring to be associated with the United Kingdom, and the threat of the renewal of hostilities on an unprecedented scale was necessary in 1921 to force a reluctant assent from the delegates representing the Irish people. The freedom of the association of the Union can hardly be put in a much more favourable

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light; two of its provinces in 1919 laid before the Prime Minister at Paris their plea to be permitted to secede,[1] and then, and as late as 1926, there can be no doubt of the sentiments of the Nationalist majority in the Transvaal and the Orange Free State. To assert, therefore, that the association is now free, can have one meaning only, that it is open to the Dominions to discontinue the connexion when they please. Virtually this was the interpretation of the Report suggested to his followers by General Hertzog; it was unnecessary to continue the old demand for full independence, because that had been obtained, and General Hertzog was far too astute not to realise that no State can be deemed independent if it is linked to another by a chain which it cannot sever of its own volition.

It is, however, manifest that, under the existing constitutional law of the Empire, no Dominion has the power to secede of its own volition, and that no Dominion Act, even if assented to on behalf of the Crown, would have the slightest power to sever the British connexion. It is an elementary principle of English law that a Parliament created for a definite purpose cannot enact validly any legislation beyond the scope of the powers assigned to it. The Privy Council from an early date refused narrowly to confine Dominion legislation within rigid bounds. It has insisted that such bodies as Dominion Parliaments are not mere delegates of the Imperial Parliament restricted to a defined sphere and fettered in their operation even within it. On the contrary, once given power over a subject, they are entitled to act as they deem wise in the choice of means to bring about the ends at which they aim. But that

[1] Keith, *War Government of the British Dominions*, pp. 230-33.

is a totally different thing from asserting that they can alter the subjects, or disregard the conditions, on which they have been empowered by the Imperial Parliament to legislate. So far as they do so, the enactments are simply without force or value, and no court, be it local or Imperial, can properly give effect to them.

Now the purpose of the Constitution of Canada is unequivocally stated in the Preamble of the British North America Act, 1867, and the terms are unambiguous: "Whereas the provinces of Canada, Nova Scotia, and New Brunswick have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in principle to that of the United Kingdom, and whereas such a Union would conduce to the welfare of the provinces and promote the interests of the British Empire; and whereas on the establishment of the Union by authority of Parliament it is expedient not only that the constitution of the legislative authority in the Dominion be provided for, but also that the nature of the executive Government therein be declared; and whereas it is expedient that provision be made for the eventual admission into the Union of other parts of British North America: Be it therefore enacted," etc. It is perfectly clear that the constitution was given for a single definite purpose, and that this purpose absolutely negatives the idea that the Parliament created by it can destroy that purpose. Nor is there any ambiguity in the corresponding Preamble of the Commonwealth of Australia Constitution Act, 1900, which runs: "Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the

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blessing of Almighty God, have agreed to unite in one indissoluble federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland." That the Commonwealth Parliament should seek to destroy this essential condition of its existence is incredible, but it is also legally impossible. Nor is the Union Parliament in any better case. The Preamble to the South Africa Act, 1909, reads: "Whereas it is desirable for the welfare and future progress of South Africa that the several British colonies therein should be united under one Government in a legislative union under the Crown of Great Britain and Ireland." Still less can it be suggested that the Parliament of New Zealand which was given under the Constitution of 1852 merely "authority to make laws for the peace, order, and good government of New Zealand, provided that no such laws be repugnant to the law of England", or Newfoundland, which owes its power of legislation to the prerogative grant of the Crown by Letters Patent of 1832, can deny the sovereign and seek to abolish the connexion with the Imperial power.

The position is still more obvious, if that were possible, in the case of the Irish Free State. The treaty of 1921 was admittedly a surrender by the representatives of the Irish rebellion of their demand for the recognition of independence, and the position of the Free State is defined in a treaty which provides by Article 1: "Ireland shall have the same constitutional status in the community of nations known as the British Empire, as the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, and the Union of South Africa, with a Parliament having powers to make laws for the peace, order, and

good Government of Ireland, and an Executive responsible to that Parliament, and shall be styled and known as the Irish Free State." Article 2 emphasises the position: "Subject to the provisions hereinafter set out, the position of the Irish Free State in relation to the Imperial Parliament and Government and otherwise shall be that of the Dominion of Canada, and the law, practice, and constitutional usage governing the relationship of the Crown or the representative of the Crown and of the Imperial Parliament to the Dominion of Canada shall govern their relationship to the Irish Free State." It has been repeatedly admitted in the Dail that the treaty forbade secession, and, to emphasise the position of inseparable Union the treaty by Article 4 provides: "The oath to be taken by members of the Parliament of the Irish Free State shall be in the following form: I . . . do solemnly swear true faith and allegiance to the Constitution of the Irish Free State as by law established and that I will be faithful to His Majesty King George V., his heirs, and successors by law, in virtue of the common citizenship of Ireland with Great Britain, and her adherence to and membership of the group of nations forming the British Commonwealth of Nations." There is a vital difference between the position in the Free State and an ordinary Dominion as regards the oath. In other cases the oath is governed by the rules affecting constitutional change in general, and has no special sanctity. In the case of the Free State it is insisted on by the treaty, which is the paramount law of the Constitution of the Free State, and it is impossible for the Parliament to alter its terms. Mr. de Valera's effort to secure in 1928 the alteration by means of the use of the initiative of the

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oath was resisted strenuously, among other reasons, on the ground that it was not competent for the Dail to consider a proposal which was directed not merely to the setting-up of the initiative as an effective part of the Constitution, but to the enactment by this means of the removal of the oath altogether.[1] Indeed, Mr. de Valera was reduced to defending his proposal by the ingenious argument that the terms of the treaty would be left intact by his proposal; the effect of the article was not to impose the necessity of taking an oath on members of Parliament but to specify the nature of the oath if any oath were imposed. The contention is not wholly impossible of defence as a mere matter of treaty interpretation, but there is not the slightest doubt that on the basis that treaties are to be interpreted according to their manifest intent and purpose, and in accordance with the agreement really made by the contracting parties, there is not the slightest possibility of accepting his version of the compact. It has been suggested, naturally enough, that the contention of the Irish Republican leader is supported by the interpretation given to Article 10 of the treaty by the Privy Council in the case of Wigg and Cochrane,[2] where the meaning of the treaty was extracted from its precise terms, ignoring the evidence that was available in favour of the sense put on that Article by the contacting parties. But the cases are vitally different. The issue there was, the meaning to be placed on the rule that officers who retired from the service of the Free State as a result of the change of Government were to

[1] Keith, *Journal of Comparative Legislation*, 1928, pp. 299-301.

[2] *Wigg* v. *Attorney-General of Irish Free State*, [1927] A.C. 674; *In re Article X. of Articles of Agreement for a Treaty between Great Britain and Ireland*, 45 T.L.R. 57.

receive fair compensation on "terms not less favourable" than those provided under the Government of Ireland Act, 1920, and the Irish High Court and the Privy Council agreed that this rule could not be interpreted to mean, as the two Governments contended it did mean, compensation on the same terms as those which would have been applied under the Act of 1920. It is, in fact, plain that if the Governments meant this, they lamentably failed to make their meaning explicit, and that it would have been unjust to the officers concerned if the terms of the treaty had been whittled down against them and they had been denied the "fair compensation" solemnly enshrined in the treaty and enacted by the Imperial as well as the Free State Parliament.

It is, therefore, abundantly clear that no Dominion can legislate, even with the Royal assent, so as effectively to terminate the connexion of the Dominion with the Empire. Nor, it must be added, does it appear that the Royal assent could properly be accorded by the representative of the Crown, or the King himself on the advice of the Imperial Government. When a Parliament seeks to exercise a power which is of dubious validity, it is established practice that assent is admissible and that it may be left to the courts to criticise and restrain abuse of power. But it is a very different matter when the enactment is, on the face of it, an abuse of authority, and there is little doubt that the dictum of General Smuts is sound when, on his return to the Union of South Africa, bearing with him the treaty of peace, he insisted on the vast enhancement of Union status, but absolutely denied the right of the Crown to assent to an Act seeking to sever the con-

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nexion of the Union with the Empire. On this point there was absolute disagreement between him and General Hertzog, who wished to insist that, if the new status claimed by General Smuts was real, it must carry with it the right to legislate to terminate dependence on the United Kingdom.

That there is now any desire for secession in the Dominions may be safely denied as regards Canada, the Commonwealth, New Zealand, and Newfoundland. Mr. Ewart's propaganda in Canada,[1] based on the disadvantages of the British connexion, and supported by a pessimistic and exaggerated analysis of the errors of British foreign policy and the wickedness of British wars, has failed to convince the vast majority of his fellow countrymen, and French Canada, while absolutely wedded to autonomy, is convinced that the connexion of Canada with the United Kingdom brings with it a security for the position of the province in respect of its linguistic and religious privileges which would not otherwise be easily secured. Defence needs sufficiently necessitate, though they do not explain, the regard for the British connexion held by the great majority of Australians and almost all New Zealanders, while the loyalty of the oldest colony, Newfoundland, is as unquestioned as its claim to the epithet is contested. That the Irish Free State appreciates the enforced British connexion is perhaps too much to say, but it is a matter of the utmost difficulty whether there is not really a very widespread acceptance of the attitude of the Ministry, which in 1926 explained its relation to the Imperial Conference on the ground that

[1] *Independence Papers*; see Corbett and Smith, *Canada and World Politics*, pp. 132, 166, 167.

the time might come when the League of Nations would afford sufficient safeguards for the security of minor states, but that, as matters were, it was all to the advantage of the Free State to be associated with a great power. The estimates for defence are a sufficient proof of the wisdom of this attitude, and it is incredible that if the Free State were a foreign power, the United Kingdom would be so complaisant as regards the influx of Irish immigrants of an inferior type into Scotland or the raising of protective duties against British imports, while the Free State enjoys an absolutely free market for its chief exports in the United Kingdom. In the Union it may be taken for granted that there is not a majority of the people in favour of independence, even if the European population alone is considered, and this exclusion of the coloured and native population and the Indians is impossible to justify. It is certainly difficult to believe that, if the European majority were, in fact, in favour of separation, that policy would have been disowned by General Hertzog, in view of the intensity with which, throughout his career, he has resented the British connexion, and the strong feeling of the back-veld Boers.

Admitting, however, that the effective desire for the right to secede is not now manifested in the Dominions, it remains to be considered whether any formal arrangement on the head is desirable. In the re-examination of the Imperial Constitution, should agreement be achieved as to the conditions on which the right of secession should be recognised? That the Dominions have such a right—not as a matter of law, but of practical expediency—was once, perhaps rather hastily, asserted by the late Mr. Bonar Law when the

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Government of Ireland Bill of 1920 was passing through the House of Commons and Mr. Asquith suggested that Dominion status might be conceded to Ireland. Mr. Bonar Law declined to homologate the proposal. He insisted that the Dominions had control of their own destinies, of their fighting forces, of the amounts which they would contribute to the general security of the Empire, and of their fiscal policies. "But", he added, "it goes much further than that. To say that he is in favour of Dominion Home Rule means something much more. There is not a man in this House, and least of all my right honourable friend, who would not admit that the connexion of the Dominions with the Empire depends on themselves. If the self-governing Dominions, Australia, Canada, chose to-morrow to say, 'We will no longer make a part of the British Empire', we would not try to force them. Dominion Home Rule means the right to decide their own destinies." It is always dangerous to lay too much stress on the language used by a politician in combating a proposal which he desires to make appear ridiculous, and Mr. Bonar Law's assertion is lacking in precision. It was tacitly corrected by the Prime Minister himself, who, on November 11, on the third reading of the Bill in question, was careful to safeguard himself from the appearance of admitting *sans phrase* the right of a Dominion to secede. It is significant that Mr. Bonar Law chose for his examples two illustrations which were innocuous and was silent on the case of the Union, and it is probable he regretted afterwards the implications read into his speech by General Hertzog and Mr. Tielman Roos.

The right of secession as a theoretic assertion of

autonomy has some supporters, and it is perfectly true that, as long as it does not exist, the language of the Report of the Imperial Conference can only be regarded as exaggerated and, therefore, undesirable. But it would prove extremely difficult to define the conditions under which the right should be exercised. It is obvious that no mere chance majority could be accorded so serious a right. It would be essential to insist on some form of referendum, and the mode of recognition would involve the passing of Imperial legislation based on addresses from the Houses of the Dominion Parliament, setting out the evidence of the will of the people of the Dominion and the safeguards which had been included to prevent undue hardship being inflicted on any class of persons as the outcome of the change. There would clearly have to be provisions regarding the loss of nationality by secession, and some right of retention of British nationality would have to be stipulated for in favour at least of those actually living at the moment of secession if not of their descendants. Nor would it be possible to permit secession to take place without the consideration of the whole question by an Imperial Conference and the assent of the other Dominions. But it would be needless to consider in detail the conditions which must be imposed. They are so complex that the possibility of defining them satisfactorily in advance is negligible, and the matter must be left to be dealt with in the precise circumstances in which it may unfortunately arise. A mere provision for a certain length of notice of withdrawal from the Empire, as has been suggested on the analogy of the rules regarding withdrawal from the League of Nations, would be utterly inadequate to meet the case. The League has no

sovereign powers over its members, who are in it by their own volition and who must be able to retire freely therefrom. The Crown in the United Kingdom owes duties to British subjects in the Dominions, as the counterpart of their allegiance and their historical relations to the Crown as Imperial, and the United Kingdom cannot treat the Parliament of any Dominion as capable of expressing by a simple majority the desire to terminate the relation between the Empire and British subjects in that Dominion.

This, then, is the first great restriction on the sovereign powers of the Dominions. They are part of the British Empire,[1] and, however gladly they may form such a part and willingly accept their membership, none the less they have no power to terminate that membership without the legal intervention of the Imperial Parliament. Whatever the powers of a Dominion Parliament, it remains only the legislature of a Dominion, of a territory which does not possess the right to decide its own fate. Its great authority over its territory must not blind us to the inferior character of that power in comparison with that of the United Kingdom. The jealous care with which the use of the term Imperial is avoided by recent writers and speakers when referring to the Parliament of the United Kingdom is utterly uncalled for. That Parliament is, and probably will long remain, sovereign both internally and externally in a sense inapplicable to the Parliament of a Dominion.

[1] The effort to distinguish the British Commonwealth from the Empire and to deny that the Dominions form part of the Empire contradicts Article 1 of the Irish treaty.

CHAPTER X

CONSTITUENT AND LEGISLATIVE POWERS

I. *The Restrictions on Constituent Power*

THE second fundamental limitation on the powers of Dominion Parliaments lies in their inability to exercise the unfettered constituent power which belongs to the Parliament of the United Kingdom. That Parliament has no superior, and it cannot bind itself. No one saw this point more clearly than Grattan in the discussions in Ireland regarding the abandonment by the British Parliament of legislative power over that country.[1] He was content with the Act of 1782 repealing the assertions made in the Act of 1719 by which the legislative supremacy of the Imperial Parliament over Ireland was formally expressed. This action in his opinion constituted the only possible settlement of the issue which was competent to the Imperial Parliament. Ireland had asserted its sole right to legislate for itself; the Imperial Parliament had deliberately repealed the Act, asserting its right to legislate for Ireland. It was perfectly true that it might again legislate for Ireland, but the safeguard was one of good faith and policy, and no further legislative declaration could alter the position. It could at any time be repealed by the Imperial Parliament,

[1] J. T. Ball, *Irish Legislative Systems*, pp. 133-5.

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and it was not within the power of that body to bind any successor. Flood, for his part, in rivalry with Grattan, patronised the idea of a further act of renunciation, and the Imperial Parliament, which was determined to leave no excuse for any grievance or suspicion in the Irish Parliament, proceeded formally in 1783 to declare that the right claimed by the people of Ireland to be bound only by laws enacted by the Parliament of that Kingdom in all cases whatever was established and ascertained for ever. It is curious that this Act was justified in the opinion of Flood by the admitted fact that by inadvertence, even after the Act of 1782, Ireland had been included in one or two minor Imperial Acts. It was admitted that these Acts were binding, despite the Act of 1782, and it was soon to prove that the Act of 1783 was as little adequate to save the Irish from Imperial control. The Irish Parliament itself was bribed into consenting to abandon the right which the Imperial Parliament had declared to be established for ever, and Ireland for a hundred and twenty years was to be governed by a Parliament in which the voice of the people of Ireland counted for nothing of importance for their welfare.

This paramount right of a fully sovereign Parliament is without parallel in the Dominions, whose Parliaments have power under certain conditions to alter their Constitutions, but must comply exactly with such conditions on pain of the nullity of their Acts. This principle rests on the Colonial Laws Validity Act, 1865, which admits the right of every representative legislature to alter its Constitution but only subject to the observation of any conditions which may be laid down by Imperial or local Act regarding the mode of

change. The grant which, made in 1865, affirmed in part what was deemed to be the existing law, is of the utmost value, but circumstances have dictated that the conditions of change are often stringently limited. Above all is this necessary in the case of the change of the federal Constitutions of Canada and the Commonwealth. In the fullest form these Constitutions rest on agreements, or loosely treaties, between the provinces and the States, and the power of change must thus be limited, so that the framework of the federal compact may not lightly be altered.

The Constitution of Canada is, indeed, as a result of the importance attached to the fixity of the federal agreement, most rigid in its character. The Parliament of the Dominion has a mere scintilla of constituent power. It cannot amend the provisions as to the executive Government, including the vesting of authority in the Crown and in the representative of the Crown. It cannot touch any of the provisions affecting the Senate save its quorum. It cannot even alter the quorum of the House of Commons; it can regulate its franchise, but it can only change the numbers of the House subject to the rule that Quebec must have sixty-five members and the other provinces must have proportional representation varied with the decennial census. It required an Imperial Act to enable it to appoint a Deputy Speaker and to enlarge its privileges as to giving to Committees powers to take evidence on oath. It is helpless to improve relations between the Senate and the lower House, and, when it became imperative to provide for an increase in the numbers of the Senate and the grouping of Senators on a slightly changed basis, Imperial legislation had to be invoked.

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More than that, it cannot alter a single clause of the distribution of powers between the provinces and the central power; however urgent some change may be, and however little objectionable it is in principle, it is impotent. When its laws necessary in the interests of the Dominion are ruled invalid, the legislature cannot, as in England, step in and validate the matter. Nor are the provinces in much better state. True that, unlike the Dominion, they can alter their Constitutions freely in all points save those affecting the position of the Lieutenant-Governor as head of the provincial government. But what is really important is the question of relations between the provinces and the federation, and here they are as impotent as the federation. Nor is this a mere matter of theoretical objection. The existence of the inability of Canada to legislate alone explains the many inconvenient decisions of the Courts which are allowed to operate.

All change for Canada, when it passes beyond something unimportant,[1] lies with the Imperial Parliament, and it is obvious that it is extremely invidious for that Parliament to act save on the unanimous voice of the Dominion and the provinces. In 1907, when the issue was the very minor question of varying in the direction of much greater generosity the subsidies paid by the federation to the provinces, the objections of British Columbia might have prevented Imperial action, had not the Premier candidly admitted that, while he desired to see the proposals amended, his province would not stand in the way of enactment if the Dominion Government would not move from its decision not to

[1] It will require an Imperial Act to allow women to become Senators (Mr. Lapointe, House of Commons, April 24, 1928).

increase the settlement figures. As it was, his wishes were given effect to by the Imperial Government in one important point. The federation would have had it declared in the Act that the new settlement was final and unalterable, but the Premier's objection was upheld by the British Government on the score that an Imperial Act was never, and could never be, final and unalterable, for Parliament could not bind any successor. It is, therefore, clear that the objection of even a single province—save perhaps Prince Edward Island—on a point of principle would paralyse Imperial action, and this restriction has largely explained why Canada has not come forward with any suggestions for the alteration of the division of legislative power between the provinces and the Dominion.

Those who claim autonomy for Canada naturally cannot acquiesce in a position under which the supremacy of the Imperial Parliament is insistent and undeniable. A sovereign State whose constitution can only be altered by another power is a contradiction *in adjecto*, and efforts have of late been made from time to time in Canada to ascertain from the provinces whether there is any chance of agreement on a mode of altering the Constitution which shall not involve the action of the Imperial Parliament. The fatal obstacle to any such consummation is the position of Quebec, which has repeatedly and firmly asserted through her Premier, M. Taschereau,[1] that she is determined to preserve the rigidity of the Constitution which assures her a veto on any change in the vital matters affecting her, the issues of language and religion. It is natural enough that Quebec should have this feeling. As

[1] See his statement of January 14, 1927 (*The Round Table*, xvii. 354).

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matters stand, the Roman Catholic religion is firmly entrenched in the province, in Ontario, in Manitoba, in Alberta, and Saskatchewan religious teaching in the schools is secured, and the official languages of the federation are English and French. What would be the result if the Constitution could be changed by Canada herself, it is hard to say. *Prima facie* the strength of the French Canadians suggests that they could maintain their privileges more or less intact, but that is dubious, and the spectacle of the United States, in which State support of religion as in Quebec is unknown, is not encouraging. It appears, therefore, that this fundamental limitation of Canadian autonomy must remain indefinitely, and with it, of necessity, the supreme power of that Parliament over Canada.

The Commonwealth of Australia adopts a different principle as to the change of its Constitution, but one equally preventing the Parliament for exercising more than a limited and defective sovereignty. The whole Constitution is open to change, but the procedure is elaborate and involves the intervention of the people. The normal procedure is that any proposed change must be passed by each House of Parliament by an absolute majority of its members, and then, after two but within four months, it must be submitted to the vote of the electorate. But, if one House declines to accept a Bill passed by the other House, and the latter sends it up again after three months, with or without any amendments made by the former House, the Governor-General may submit the issue to the referendum. Assent to the Bill needs not merely a majority of electors voting in the whole of the Commonwealth, but also a majority of the States, but no alteration

diminishing the proportionate representation of any State in either House of Parliament or its minimum number of representatives in the House of Representatives, or increasing, diminishing, or otherwise altering its limits, or in any manner affecting the provisions of the Constitution relating to it, can become law unless it is approved by a majority of voters in that State. The restrictions are most serious in fact. The grave defects in the operation of the Commonwealth Constitution which have repeatedly manifested themselves have remained without remedy of any kind simply because the people of the Commonwealth, despite repeated efforts to induce them to sanction increases of federal power, have refused to accord the demands of the federation. Hence it still cannot control monopolies or take them over and work them for the sake of the people; it has no legislative power over labour conditions and can only work through its power to create a Court of Conciliation and Arbitration for the prevention and settlement of industrial disputes extending beyond the limits of one State. It cannot exercise a general control over companies, and its powers at every turn are hampered by the limits of its control over internal trade as opposed to external trade. Moreover, in many points, both the States and the Commonwealth are hampered by the vague terms of the Constitution such as the section providing for free trade between the States; thus the excellent attempt of South Australia to regulate in the interest of all concerned the export trade in dried fruits has failed because of its running counter to this restriction.[1]

As regards their own Constitutions the States are far

[1] Keith, *Responsible Government in the Dominions*, Part IV. chap. ii.

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happier because the restrictions once imposed by the Imperial Parliament or their own legislation have been gradually weakened and removed. The chief barrier against rash change is merely that contained in the Australian States Constitution Act, 1907, which only imposes the necessity of reserving Bills bringing about fundamental alterations, and excuses this, if there is obtained in advance the assent of the Imperial Government. How wide is the power of change is shown by the judgment of the Privy Council in *M'Cawley* v. *The King*,[1] when it was held, overruling the High Court of the Commonwealth, that there is no need for a formal alteration of the Constitution to be made in order to allow of the appointment of a judge with a limited tenure of office, despite the general rule of the Constitution Act that judges hold during good behaviour. The High Court had naturally held that, if such a change was to be made, it should be done with due form, and not merely by the creation of a judge with such a tenure, but the Privy Council negatives this doctrine in the most distinct form.

But the powers of the States do not touch the vital question of the relations between State and federal power. Those are dealt with in the Commonwealth Constitution and they cannot be changed by any exercise of State authority, and thus the State and the Commonwealth Parliaments taken together do not possess even for Australia the constituent power of the Imperial Parliament. The vote of the people is an essential ingredient, and it is only after it has been accorded that the question of Imperial intervention arises. The Royal assent is essential, and it may be assumed that in a

[1] [1920] A.C. 691.

matter which had been approved by the people that assent would readily be forthcoming, provided always that the act was within the powers of the Commonwealth Parliament and of the people. But it is fairly certain that the limitation of constituent power is not confined to the necessity of popular assent. The Commonwealth Constitution exists under an Imperial Act, and has no validity save such as is given to it by that Act, and that Act, as we have seen, expressly recites that it is passed to give effect to the desire of the colonies to be united in an indissoluble federal Commonwealth. Hence, it appears that any changes which are made by the process prescribed must still be such as will not contradict the rule that the Constitution must be federal. The States are entitled to this degree of protection, and if it were decided, as has often been suggested by the Labour Party in the Commonwealth, to abolish the federal principle and to substitute a unitary form of government with the creation of local authorities in lieu of the States, it would seem necessary, in order to avoid the probability of the High Court ruling the changes void, that the purpose should be carried out under the sanction of an Imperial Act.

It must be added that the procedure for constitutional change has serious disadvantages from the point of view of war emergency. In both the Commonwealth and Canada during the war of 1914–18, there arose a situation in which the power to extend the duration of Parliament was desirable, and in both the restrictions on constitutional change proved most embarrassing. Mr. Hughes found his effort to obtain addresses from both Houses in favour of an extension foiled, and a general election became necessary, while in Canada

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Sir R. Borden found that, although there was agreement for a first extension of the life of Parliament, carried out by Imperial Act in 1916, there was such opposition to a second extension that a general election became necessary.

In the case of New Zealand the exact power of the Parliament to alter the Constitution is not beyond doubt. The original Constitution in 1852 was silent on this vital issue, but an Act of 1857 conferred power to alter the greater portion of the Constitution but excepted certain issues from this authority. These excepted issues include the existence of the Parliament itself, the rules as to place and time of meeting, prorogation, and dissolution, the taking of an oath or an affirmation by members, the power of the Parliament to legislate, the rules as to assent to, reservation of, refusal of assent to, and disallowance of legislative measures; the rules regarding appropriation of public money; the prohibition of the imposition of duties on stores intended for the imperial forces or contrary to treaty, and certain provisions as to native lands, and civil and judicial services. It is, however, very possible that the wider power of change accorded generally by the Colonial Laws Validity Act, 1865, supplements the authority of the Dominion Parliament, and that there is no legal impediment in way of the carrying out of the desire at one time felt to abolish the upper house and render the Parliament unicameral. In any case, it is required that Bills altering the salary of the Governor-General and the appropriation for native purposes must be reserved. The power conceded in 1857 was eventually used in 1875 to bring to an end the existence of the provincial system which the colony had out-

grown. In lieu of the semi-autonomous provinces then existing under the Constitution of 1852, there was substituted a system of local government authorities, and these have proved adequate for the needs of the colony.[1]

In the case of the Union it was the aim of the creators of the new system to leave the fullest measure of authority to the Legislature, and accordingly the Act as passed gives a very wide power of change. The only restrictions on this constituent power beyond the general rule that the Constitution provides for a legislative Union is that imposed by s. 152 of the South Africa Act. Under it a special procedure must be observed for the change of certain sections of the Constitution, including those relating to the gradual increase to 150 of the number of members of the House of Assembly, the rule regarding the alteration of the Cape native franchise, and that regulating the equality of English and Dutch in official use. In all these cases the change proposed must be passed by both Houses in joint session, and at the third reading must be agreed to by two-thirds of the total number of members of both Houses. Further, the same procedure is applicable to any proposal to alter this restriction, a provision necessitated by experience in other colonies that, while changes could not be carried without observing certain rules, it was possible to abolish by simple Act the restrictions and thus to defeat the purpose of the Constitution. There was added, before the final approval of the Constitution in South Africa, a rule requiring, in certain cases, the reservation of Bills effecting constitu-

[1] Hight and Bamford, *Constitutional History and Law of New Zealand*, pp. 289-300; W. Pember Reeves, *The Long White Cloud*, pp. 193-5, 240-42.

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tional change. Thus, all Bills amending the provisions of the Constitution respecting the House of Assembly must be reserved, and any Bill altering the powers of the provinces or abolishing them, as well as any Bill altering the provision thus laid down for reservation. The provision was inserted in order to secure a certain measure of security for the provinces. It had been determined, thanks to the insistence of the Transvaal and the Orange Free State, that the Constitution should not be truly federal, but, as Natal had wished for a federal system and was anxious lest the provincial authority should be too much at the mercy of the Union, this very faint grant of protection was accorded to it. It was also made clear by the Imperial Government, when the House of Commons was asked to pass the Act, that the Governor-General would be specially required to reserve any Bill abolishing the native franchise in the Cape, and this provision duly appeared in the Royal instructions.[1]

Newfoundland, free from difficulties as to provincial claims and native rights, possesses a general power of constitutional legislation, which has been used, for instance, to reduce the upper house, when it proved refractory, to the powers now possessed by the House of Lords under the Parliament Act. But, curiously enough, the Crown was given power by Imperial Acts of 1842 and 1847, which are still valid, to provide as to the qualifications to be required of the members of the House of Assembly, the residential qualifications of electors, the simultaneous holding of elections, and the necessity of the recommendation by the Governor of money Bills. These powers have been exercised, and

[1] See also Lord Crewe's warning in the House of Lords, July 27, 1909.

the provisions so made stand as part of the Constitution. It is uncertain whether they could be altered by legislation under the general power given by the Colonial Laws Validity Act, 1865, and it still seems that the constitutional, and perhaps the only legal, method of procedure, if it were desired to secure changes, would be by address to the Crown asking for the alteration desired to be made under the Acts, or for the repeal of the Acts, leaving the way open for local legislation. In accordance with the Royal instructions to the Governor, any constitutional Bill involving extraordinary provisions would unquestionably have to be reserved for the consideration of the Imperial Government.

The case of the Irish Free State presents some rather perplexing features, for the general rule already cited provides that the constitutional position is to be assimilated to that of Canada, and Canada, as has been seen, has practically no constituent powers. Very probably this point was not present to the minds of the negotiators, and in any case the Constitution of the Free State, which was accepted by the Imperial Government in 1922 as according in substance to the treaty, claims for the Free State the widest constituent powers. So far from being a rigid Constitution, it was admitted that it was drafted hastily and might be imperfect, and it was accordingly provided that for the period of eight years after the coming into operation of the Constitution on December 6, 1922, any amendment thought necessary might be made by ordinary Act, but that after that date amendments should require the assent of the people at a referendum. To be passed, a measure must be voted on by a majority of voters on the register, and either a majority of the voters on the

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register or two-thirds of those who vote must approve the change. It must, of course, be remembered that it was contemplated by the framers of the Act that any law to amend the Constitution passed in the first eight years of its existence would be subject to the provision of the Constitution for the taking of a referendum on any Bill. The arrangement in question provided that any Bill might be suspended in operation for ninety days on the motion of a majority of the Senate or two-fifths of the Dail; if within that period a demand for a referendum were made by three-fifths of the Senate or a twentieth of the voters on the register, a referendum was essential. But the value of the provision was marred by the rule that the procedure could not apply to a Bill which was declared by both houses to be necessary for the immediate preservation of the public peace, health, or safety. Hence, in practice the safeguard against hasty alteration proved valueless. The provision of the referendum was a menace to the security of the Governmental majority, and in 1928 it was deleted from the Constitution by a simple Act, which meted out the same fate to the initiative for which provision was to have been made under the Constitution. It may well be that neither referendum nor initiative is a desirable form of procedure, but the Bill to abolish both was declared by the two Houses to be necessary and so exempted from the referendum. There was much force in the observation of Senator Sir John Keane that it was clearly not the intention of the Constitution to allow the abolition of the referendum by a small party majority without the reference of the issue to the popular vote.

Wide as is the power thus accorded to the legisla-

ture, virtually to the lower house, for the Senate has mere powers of delay, it is essentially limited by the terms of the treaty. Any Act which is inconsistent with that instrument is mere waste paper, and the Courts of the Free State no less than the Privy Council would be bound to declare it so. Nor can the legislature prevent the issue from reaching the Privy Council without a breach of the treaty, for the right to appeal is an essential feature of the Canadian Constitution, and is, therefore, implied in the Free State Constitution, as the British Government insisted when it was desired by the Free State Government to omit any appeal from the Constitution. The Free State, therefore, is limited to changes essentially of an internal and minor character; the main lines of the scheme must not depart too far from those of Canada or they transgress the treaty and are absolutely void. The representative of the Crown, it is plain, could not properly give his asssent to any Act which violated the treaty, and it is significant when the Free State desired to defy the ruling of the Privy Council as to the measure of compensation to be granted to officers retiring from its service, it found that the long patience of the Imperial Government might be exhausted, and it consented, in lieu of seeking to legislate merely of its own authority, to concert action in 1929 with the Imperial Parliament. Thus, once again has the principle been established that the Imperial Parliament has a supremacy which cannot be ignored even by the most independent of Dominions.

Reference has been made above to the rule that certain measures in the Australian States, in New Zealand, the Union, and Newfoundland must be reserved for the signification of the Royal pleasure, which is given or

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withheld on the recommendation of the Imperial Government. It has been suggested that this form has been made meaningless by reason of the declaration of the Imperial Conference of 1926 on the question of the disallowance and reservation of Dominion legislation. But the scope of that opinion has been misunderstood. The relevant assertion is the decision to place on record "that, apart from provisions embodied in constitutions or in specific statutes expressly providing for reservation, it is recognised that it is the right of the Government of each Dominion to advise the Crown in all matters relating to its own affairs. Consequently, it would not be in accordance with constitutional practice for advice to be tendered to His Majesty by His Majesty's Government in Great Britain in any matter appertaining to the affairs of a Dominion against the views of the Government of that Dominion." Whatever the significance of this declaration, which will be examined below, it has expressly no relevance to cases where reservation is required under statute in Constitution Acts, and the exception was, of course, deliberate and advised. That there should be any hesitation to accept constitutional changes desired by the Dominions or States of Australia is most improbable, but the possibility of refusal of assent is still retained and no binding pledge has even been suggested by the Imperial Conference against its use. It remains conceivable that any chance majority of a legislature might bring forward some proposal so seriously unfair to the minority, and so dissonant from established practice, that it would be just for the Imperial Government to withhold concurrence. The days are doubtless gone when the Imperial Government should claim the power to

refuse assent to a constitutional change in a Dominion because it does not approve it; but there is nothing to negative the possibility in an extreme case of delay pending reference of the issue to the other Dominions. At any rate, whether the abolition of this reserved power is desirable or not, it is plain that the Imperial Conference of 1926 did not commit itself to any opinion against the existence of the authority in question.

II. *The Disallowance and Reservation of Dominion Legislation*

As has been shown, in a very wide sphere of action the power of the Imperial Government to secure the frustration of Bills passed by the two Houses of Dominion Parliaments has long been disused. The authority, however, exists unimpaired in law, though the exact terms of the several constitutions vary slightly. In all, however, there is the authority given to the Governor-General to reserve Bills, which then cannot become law without the express assent of the King in Council, *i.e.* on the advice of the Imperial Government, and such assent must be given within two or in the more recent constitutions one year. But even if a Bill should be assented to by a Governor-General, whether or not in violation of his instructions, there remains the power of the Crown to disallow the Act within a specified period. Only in the Irish Free State is this latter authority left unprovided for in the Constitution, and it may be doubted whether the omission is legally valid, seeing that the treaty provides for the overriding principle of similarity as regards the rela-

tions of the Free State Parliament to the Imperial Government with those between the Parliament of Canada and the Imperial Government. The matter, however, is perhaps of academic importance, and for that reason, doubtless, it was not considered essential by the Imperial Government to take exception to the omission in the Free State Constitution.

Nothing, of course, save legislation can annul the present provisions of the constitutions affecting the powers of the Crown and the representative of the Crown. In Canada they could be taken away only by an Imperial Act, and until taken away the Free State could not abolish the existing power of the representative of the Crown to reserve Bills. In the Commonwealth they might be removed by the usual process of constitutional change through the referendum; as regards New Zealand, the position as we have seen is disputed, as this is one of the points power to alter which is withheld by the Act of 1857; and in South Africa and Newfoundland the matter falls within the scope of ordinary constitutional legislation. But, unless and until these steps are taken, the power of the Imperial Government to control legislation in the Dominions remains in law unquestionable. It has indeed been argued that in the Commonwealth the absence of any specific provision authorising the Governor-General to be instructed by the Crown as to the mode of exercise of the power of reservation means that no such instructions can be given. This view clearly was unsound, and in the other constitutions the matter is placed beyond doubt. The Free State Constitution by Article 41 expressly mentions once more the application to the action of the Governor-General of the Canadian prac-

tice which provides in express terms for the giving of Royal instructions.

These facts are most important in view of the terms of the Report of the Imperial Conference cited above regarding the withholding of assent from Dominion measures. It appears that it was explained by the representatives of the Irish Free State that they desired to elucidate the constitutional practice in relation to Canada, since it was provided by Article 2 of the treaty of 1921 that the position of the Irish Free State in relation to the Imperial Parliament and Government and otherwise shall be that of the Dominion of Canada. The wish of the Free State representatives was doubtless gratified by the response of the Conference cited above, but it is difficult to understand precisely what the Conference agreed to or thought it agreed to. The reference to "provisions embodied in constitutions or in specific statutes expressly providing for reservation" clearly governs all that was laid down, and the rule that the British Government should not advise the Crown to act contrary to Dominion advice is applicable only to Acts or Bills which do not fall within the saving clause. Does the rule, therefore, mean that, save in cases where under any existing provisions reservation was requisite, the Crown should not refuse assent to Dominion Bills? Or does it mean that the refusal of assent is only to be possible when an Act expressly requires that some specified class of Bills should be reserved? Instances of this exist, though they are rare; the two obvious ones are the requirement of reservation of Australian or Union Bills restricting the right of appeal to the Privy Council, of certain classes of Bills altering the Australian State Constitutions, one

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or two types of New Zealand and a wider range of Union constitutional Bills, and certain Merchant Shipping Bills. But it is perfectly plain that the vast majority of such reserved Bills are not measures as to which there can be any idea of refusing assent, and it would be absurd to draw a distinction between such measures and measures of far greater importance which the Constitution might not technically require to be reserved. To take the case of the Commonwealth of Australia; the Merchant Shipping Bills which are duly reserved under the Merchant Shipping Act are doubtless important, and reservation affords a useful protection to the British mercantile marine by ensuring that there is no hasty interference, and that the limits imposed on Dominion Merchant Shipping legislation by the Imperial Act of 1894 are not transgressed. But of far greater importance was the Bill of 1906 which proposed to accord a preference to British manufactures imported into the Commonwealth on British ships manned exclusively by non-Asiatic labour. Such a measure was directly contrary to treaties binding on the Commonwealth; it offended, moreover, against the sense of justice of the British Government, which could not with any decency have accepted a boon on a condition which sought to exclude every lascar from employment on ships trading to the Commonwealth. Any interpretation of the Conference Report which means that the British Government could use its discretion in refusing assent to any Merchant Shipping Bill, but must acquiesce in a far more serious Bill which was not technically subject to reservation, would be absurd. The same observation applies to New Zealand. The most unsatisfactory piece of legislation offered by New

Zealand of late years was the Bill of 1910 which was intended under the guise of regulating charges for shipping to exclude Asiatics from service in the trade with New Zealand, and which, like the Australian Bill of 1906, was reserved and never assented to by the Crown. Yet that Bill was very probably exempt, as far as technical reasons were concerned, from reservation. The only mode in which to give a reasonable interpretation to the Report is to assume that it is merely an involved mode of asserting the obvious fact that nothing but the gravest reasons would justify the Imperial Government in hindering the enactment of Dominion legislation, and that this rule applies equally to cases where existing laws require reservation and to those where they do not. The obvious increase in prudence and judgment of the Dominion Parliaments renders it dubious if any need for disallowance would normally arise, but there remains the possibility that on some occasion a Bill might be promoted which would be of so serious a nature from the Imperial standpoint that the Governor-General would have to be instructed to reserve it in order that, before it became operative, counsel could be taken on the issue by the Imperial Conference or at least by the Dominion Governments and the United Kingdom. Certainly no attempt has been made to deny that the right of reservation on Royal instructions still exists. When the Prime Minister was asked immediately after the Conference if this was to be abandoned, he hastily gave an assurance that the rule in this respect remained unimpaired, and that this function would remain with the Governor-General, whatever other changes might be made in his position.

It is apparently the view of Irish Ministers that the declaration of the Conference may be appealed to as an indication that refusal of assent to Bills is unconstitutional, and, therefore, illegal. This view is based on the provision of Article 41 of the Constitution which provides that the representative of the Crown shall, in the withholding of assent to or reservation of any Bill, act in accordance with the law, practice, and constitutional usage governing the like withholding of assent and reservation in the Dominion of Canada. If, therefore, the constitutional usage in Canada prevents withholding of assent or reservation, equally either is unconstitutional in the Free State, and in virtue of the Article actually illegal. It is extremely dubious if the argument would appeal to any Court of Law, which might well decline to accept the opinion of the Imperial Conference as a very cogent or intelligible expression of actual practice even in 1926, and which might insist that the practice to be considered must be that of 1922, when the Constitution was passed, seeing that the Article does not allude to the rules in Canada as existing from time to time. Moreover, it is fairly certain that the Conference did not mean its pronouncement to be read in the sense claimed in the Free State, and that the Free State Government is well aware of this fact. If the Report is to be taken in the most literal sense, then the obvious course for the Irish Free State, which is utterly opposed to the right of appeal to the Privy Council, is to abolish the appeal by an Act, demanding that it should be allowed to remain in operation. It is true that it might be held by the Privy Council that such an Act was a violation of the treaty of 1921 and, therefore, invalid, but it would

be easy to secure that no appeal was ever brought by providing that the attempt to bring an appeal would be punishable by fine or imprisonment or both. Such an Act would certainly not be contrary to the treaty as a matter of law, and the fact that no such measure has ever been proposed is sufficient to show that the Irish Government is not prepared to put to an acid test the theory that the Imperial power of disallowance through reservation by the Governor-General and refusal of assent is absolutely dead.

Moreover, there is one set of cases applicable to all the Dominions which desire to borrow money from the British public and to have their stocks ranked as trustee stocks in which the power to disallow is admitted formally to exist. It was laid down by the Treasury under the Colonial Stock Act, 1900, that governments which desired to avail themselves of this most valuable privilege must conform to certain conditions, including a formal declaration that, if any Act is passed which in the opinion of the Imperial Government injuriously affects the interest of the holders of the security or varies the terms on which it was issued, that Act may properly be disallowed by the Crown. It is clear that, however little chance there is of such an event occurring, no Dominion, having obtained admission of the stocks to trustee rank and having obtained the investments of trustees on that score, would dream of claiming that the Conference Report protected it from the operation of its own undertaking. Doubtless the Conference had forgotten the existence of this peculiar but most important class of measures, for it would be most disadvantageous to the Dominions if it were once believed that their securities had to be

regarded, like those of foreign countries, as liable to be depreciated by acts of sovereignty for which law gives no redress.

One minor point was dealt with incidentally by the Conference, the practice by which annually a formal intimation was sent from the Dominions Office to the Dominions stating that the King would not be advised to exercise his power of disallowance with respect to the Acts of the Dominion Parliament. This was, of course, a historical relic of a bygone time, and was preserved merely because of former practice. It added nothing to the value of the Acts, and the abandonment of the practice appears to have been effected without further delay. Indeed, it is curious that it should have seemed worth while referring to so trifling a formality in the Report. It may, however, be noted with satisfaction that there is no hint in the Report that the Conference regarded it as possible that the action to be taken by the Crown in regard to the assent to reserved Bills or disallowance of Acts could be personal and not based on the advice of the Imperial Government.

III. *The Territorial Restriction on Dominion Legislation*

On the fourth great issue affecting the extent of Dominion sovereignty the Report of the Conference was strangely vague. It admitted the existence of the rule that there was a "difference between the legislative competence of the Parliament at Westminster and of the Dominion Parliaments in that Acts passed by the latter operate, as a general rule, only within the territorial area of the Dominion concerned". But the

only opinion which, despite its earnest study of this and other points, the Conference could record was that "the constitutional practice is that legislation by the Parliament at Westminster applying to a Dominion would only be passed with the consent of the Dominion concerned". This rather inadequate observation was, fortunately, strengthened by the proposal to refer to a Committee with other points, including that of reservation and disallowance, "the present position as to the competence of Dominion Parliaments to give their legislation extra-territorial operation; and the practicability and most convenient method of giving effect to the principle that each Dominion Parliament should have power to give extra-territorial operation to its legislation in all cases where such operation is ancillary to provision for the peace, order, and good government of the Dominion".

It is, of course, normal that the legislation of the Imperial Parliament should apply merely to the United Kingdom or to one or other of its parts, and the great mass of Imperial legislation is precisely of the same type as Dominion legislation, that is, limited in its sphere of operation. But there does exist a power in the Imperial legislature which is denied to that of the Dominions. Apart from the fact that the Imperial Parliament can legislate for the whole of the Empire, it has the power to regulate matters happening beyond the limits of British territory or the territorial waters of British possessions. It normally, of course, limits its legislation to the actions on foreign territory or on the high seas of British subjects and to the regulation of British ships on the high seas. But this limitation of authority, though often spoken of by English jurists

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as if it were the natural outcome of International Law, is not by any means compelled by the principles of that law. As the evidence adduced in the famous *Lotus*[1] case before the Permanent Court of International Justice clearly established, the legislatures of many countries are prepared to treat as criminal, acts done in certain cases in foreign territories by foreigners if they affect injuriously the interests of the State or even of its inhabitants. Nor occasionally is the strict rule confining the exercise of legislative power adhered to by the British Parliament. Thus, on the score that they are protected persons, the subjects of the Indian Native States are made subject to the jurisdiction and legislation enacted under the Foreign Jurisdiction Act, 1890.

The uses made of the Imperial power are not very numerous, but they have one most valuable purpose, the regulation of the position of British subjects in countries in which the Crown exercises extra-territorial jurisdiction over British subjects, securing their exemption in a greater or less degree from the jurisdiction of local courts. This power has become of minor extent with the exemption of Turkey by the Treaty of Lausanne of 1923, and of Persia by agreement in 1928, from the operation of the system, but it still remains in a minor form in China, in Muscat, in Abyssinia, etc. Further, the Imperial Parliament has legislated to punish murder and bigamy committed abroad, as well as offences such as treason, perjury committed in connexion with official statements, breaches of the Official Secrets Act, offences against the Explosive Substances Act, and so forth. The Dominion Parliaments, however,

[1] Permanent Court Publications, Series A, No. 10.

are in a completely different position. The effect of their legislation stops at their territorial frontiers, including the territoral waters, except where it can be shown in any instance that by express enactment or necessary implication a wider measure of authority has been conferred. In various instances, as we have seen, this has been done. The difficulty about the existence of Dominion naval forces, seeing that the Dominions could not normally legislate extra-territorially, was disposed of by the Imperial Act of 1911; long before the Army Act, 1881, secured the extra-territorial effect of the military laws of the colonies. Something too was conceded by the Merchant Shipping Acts, and colonial lawyers sought from time to time to claim that the territorial limitation existed only in the imagination of Imperial law officers or British writers on constitutional law. But the weight of judicial evidence is overwhelming. The most interesting case is the famous one of *Macleod* v. *Attorney-General of New South Wales*,[1] which decided quite definitely that a New South Wales statute as to bigamy could not be used to punish a person who committed bigamy but not within the territorial limits of the State. It was conceded that the decision would have been other had the offence been brought under the Imperial Act of 1861, and in Earl Russell's case[2] it was held that a peer could be punished for bigamy committed in the United States, even if the circumstances were of an extenuating character. Despite the valiant efforts of Sir Robert Stout in New Zealand to establish the doctrine that New Zealand can legislate for New Zealand ships and New Zealanders even outside the Dominion, the doctrine

[1] [1891] A.C. 455.

[2] [1901] A.C. 446.

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has not prevailed even with his colleagues,[1] and the High Court of the Commonwealth has repeatedly admitted that the territorial limit is applicable to the legislation of the Commonwealth, save of course where the terms of the Constitution make it clear that a wider power was granted, as in the case of fisheries beyond territorial waters or the rule that the laws of the Commonwealth are in force on all ships, the King's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth. Hence, it has been held both in Australia and in the United Kingdom that the Commonwealth cannot impose taxation beyond its territorial limits, and the limitation is also admitted in Canada. Clearly it is a moot point whether the power of legislation for defence might not be sufficient to justify some measure of extra-territorial action as has been held in New Zealand, and the Privy Council has made it clear that the Dominion can expel persons from their shores at their discretion if they are prohibited immigrants. But when Canada began to organise her air service after the war, the question of her authority to govern matters taking place beyond her limits on board aeroplanes was definitely raised, and the amount of doubt existing on the issue induced a demand for the securing of extra-territorial power. Hence the Canadian Parliament as early as 1920 presented an address to the Crown asking for the enactment of legislation to provide that "any enactment of the Parliament of Canada otherwise within the legislative authority of the Parliament shall operate and be deemed to have operated extra-territorially, according to its intention in the like manner and to the

[1] *R.* v. *Lander*, [1919] N.Z.L.R. 305.

same extent as if enacted by the Parliament of the United Kingdom". This request was clearly very badly framed, and it remained without compliance, despite the difficulty of reconciling the assertions made of equality of status with the refusal of the request. After further discussion, an address was passed in 1924 in a new form; "an enactment *intra vires* of the Parliament of Canada, if expressed to operate extraterritorially shall have and is deemed to have had that operation if and in so far as it is a law for or ancillary to the peace, order and good government of Canada". It is not surprising that, despite the passage of years, this address remains still without the necessary response by the Imperial Parliament, or that the issue should have been postponed at the Imperial Conference, though it had then for six years at least been under the consideration of the British Government. If passed in the form suggested, it will afford abundant opportunities for legal decision, for it will be left to the courts to determine how far the law in question does fulfil the condition stated in the last words. But, in addition, it may be doubted whether it is desirable that Canada should be given power, as the proposed form would probably give, to make criminal, acts done by British subjects in England, which are there perfectly legal. The true line of action seems to lie far more in giving to the Dominions in general, power to regulate the actions abroad of those persons who are identified with them as their citizens or subjects primarily, and to regulate all matters affecting their registered shipping, and not merely as now, matters falling under the category of merchant shipping questions.

It must be remembered that the matter is not one

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of merely academical interest for the United Kingdom. The Irish Free State now has Dominion status, and has been compelled, by doubt as to the legal powers, to refrain from taking action outside territorial limits in fishery matters. Any concession made to Canada must automatically extend to the Free State, and, if Canada could create crimes out of actions (*e.g.* against Canadian Revenue Laws) which take place in England and there are legal, the same thing could be done in the Free State, with much greater probability of effect being given to those laws in view of the frequency and ease of intercourse with Ireland. It is, of course, clear that every Dominion must have full power to regulate its airships, and there seems no unsurmountable difficulty in securing what is desired. But the Conference evidently did not contemplate the creation in the Dominions of the full power which is vested in the Imperial Parliament. In special, it is obvious that it is not desired to surrender to the Dominions the sovereign right to regulate the actions of British subjects in countries such as China.[1] It would indeed be impossible to carry on a system under which some British subjects fell under British control and some under Dominion control. So confused a system could never have been forced on Chinese acceptance, and still less possible would the change have been at a time when the system itself in China is moribund and marked out for extinction as soon as China can assure justice to Europeans.

An interesting, if not very decisive, step to investigate the state of the law was made by Canada in an amendment of the Customs Act passed in 1928. The

[1] See G. W. Keeton, *The Development of Extraterritoriality in China* (1928).

aim of this measure is to deal with the offence of smuggling on the Canadian coast, and it purports to extend to twelve miles in the case of vessels registered in Canada, the limits of territorial waters, in order that within that range Canadian officers of Customs can board vessels hovering on the coast and bring them into port, where, if dutiable or prohibited goods are discovered on board, they will be liable to confiscation. It will be seen that the extension is not of much importance, since, as was pointed out in discussion, the smugglers will simply transfer their operations to foreign vessels or even to vessels registered in other parts of the Empire, such as Newfoundland. The validity of the measure was frankly stated to be quite uncertain, but it was pointed out that it would be desirable to have a ruling on the issue from the courts. If the measure were held to be invalid, then there would remain the remedy of an Imperial Act which had been earlier discussed. It was, however, thought that the inherent powers of Canada should cover the case. The power of Canada to regulate her aviators beyond territorial limits had been assumed to exist, and the legislation to carry out the Halibut Fisheries Treaty with the United States was adduced as a parallel exercise of extra-territorial authority to deal with vessels fishing in the open seas in the close season provided for by the treaty. Mr. Lapointe, the Minister of Justice, also invoked the wide extension of Dominion powers laid down by Sir R. Stout in the New Zealand case of the Award of the Dominion Arbitration Court, in respect of the Wellington Cooks' and Stewards' Union,[1] when

[1] 26 N.Z.L.R. 394. Mr. Lapointe's desire for extension of powers by judicial construction in lieu of legislation has some support in New

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he asserted for the Dominions a right to regulate the proceedings of their own subjects beyond the limits of the Dominions. He evidently did not attach weight to the fact that the Court of Appeal of New Zealand had departed deliberately from the views of the Chief Justice and had ruled that New Zealand could not punish bigamy committed abroad, and that Sir Robert Stout himself had introduced a Bill in 1928 into the New Zealand Parliament seeking to claim the right which he confessed was no longer judicially supported. Unfortunately, a decision in favour of the validity of the Act would have merely a limited effect, for the legislation might be supported on the narrow ground that it falls within the power to regulate registered shipping which is legitimately deemed to exist under s. 735 of the Merchant Shipping Act, 1894.

Zealand (see *Tagaloa* v. *Inspector of Police*, [1927] 833, 900), but this would never be satisfactory, for courts are better not to invent law on political grounds, which is a legislative function.

CHAPTER XI

THE SUPREMACY OF IMPERIAL LEGISLATION

THE Conference of 1926 had before it the issue of the application of Imperial Acts to the Dominions and the supremacy which these Acts enjoy over Dominion legislation by reason of the Colonial Laws Validity Act, 1865. That measure, when enacted, was the palladium of colonial legislatures, removing many doubts as to the extent of colonial legislative power. But it was now contended that the measure which had supported the youthful legislatures had come to be a burden upon them. It was strongly suggested that the purpose formerly served by Imperial legislation, the application of a general principle to the whole of the Empire, could now be secured best by the enactment of reciprocal statutes based on consultation and agreement. The Conference in this case also was cautious, and finally contented itself by referring for examination by the committee, to which reservation and extra-territorial operation of legislation were to be referred, "the principles embodied in or underlying the Colonial Laws Validity Act, 1865, and the extent to which any provisions of that Act ought to be repealed, amended, or modified in the light of the existing relations between the various members of the

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British Commonwealth of Nations as described in this Report".

There are, in fact, two issues here which are closely allied, but none the less separable. The old usage of legislating for the whole of the Empire was necessary and desirable in the early days of colonial development. It remains, as the Report recognised in connexion with extra-territorial legislation, perfectly legitimate when any Dominion cares to assent to this mode of procedure, but it is clear that, save with the concurrence of a Dominion, legislation regarding a Dominion ought not to be passed. This rule has, in effect, been observed in all that is essential for many years; occasional departures from the letter of the rule as in the English and Scottish Bankruptcy Acts or the English Trustee Act, 1925, are merely cases of belated adoption of an older practice, and no Dominion statesman would trouble to take seriously these minutiae, though, like the Acts passed after the Imperial Parliament had purported to renounce its power of legislating for Ireland, they indicate the fact that the Imperial Parliament has complete legal authority even to affect private property in the oversea Dominions, without the assent of the Dominion Parliaments. In all matters of importance the new procedure is clear. It was inaugurated by the procedure adopted in the case of copyright, when it was left open for the Dominions to adopt the Imperial Act or to legislate as they thought fit, but on the understanding that, if they legislated on similar lines, the Imperial Act would be held to extend to them. Similarly, in 1914, the British Nationality and Status of Aliens Act was expressed, as regards its naturalisation clauses, to be subject to adoption by

the Dominions, which has tardily been accorded. But the portion of the Act which defines nationality is not restricted in operation by the requirement of Dominion assent, and undoubtedly was intended to operate automatically throughout the Dominions, whether or not it was re-enacted locally for convenience. But it was only enacted with full agreement by the Dominions, and similarly it has been amended since, only with the same agreement. The policy, therefore, which in this instance has definitely been made effective, is, that an Imperial Act applying to a Dominion shall be enacted only with the assent of that Dominion. The implication, however, in the Report of the Imperial Conference is that this position is not satisfactory to the Dominions. On practical grounds, indeed, no exception could be taken to it, but the more extreme supporters of Dominion autonomy urge that no Imperial statute should apply to a Dominion without the legislative assent of that Dominion, and that the ideal course is simply identic legislation by each part of the Empire. The issue is manifestly one of minor importance, provided that the Dominions accept the necessary corollary that the Imperial statute must provide generally for extra-territorial operation of the common agreement, in so far as this may not be rendered unnecessary by the possible extension of Dominion authority to legislate with extra-territorial effect. But, constitutionally, there seems no real dispute between the British and Dominion Governments, nor any problem requiring much effort at solution.

The question of the supremacy of Imperial law, where it exists, over Dominion legislation is far less easy to handle, and it is interesting that the Report

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of the committee was very guarded in its allusion to the possibility of repeal. The matter unquestionably affects the status of the Dominions; the Colonial Laws Validity Act is a definite assertion of the supremacy of the Imperial Parliament over the Dominions,[1] and, as such, is offensive to Dominion national feeling, at any rate in its more extreme forms; thus the Irish Minister of Defence denied its validity on November 21, 1928, but without any grounds. But there is another side to the question, and one of the greatest importance. It is upon this doctrine of supremacy and of the binding force of the Colonial Laws Validity Act that the Dominion constitutions are based, and the problem would present itself, if this supremacy were removed, how the constitutions would be given effective legal validity. The matter, of course, is not beyond the capacity of legal science, but that is not the immediate issue. Would Canada care to have a constitution which did not rest on the supremacy of the British North America Act but on a consensual compact? It is plain that the answer of Quebec to this question would be absolutely in the negative, and it may be doubted if the response of Australia would not be more definite still. Nor have New Zealand or Newfoundland intimated any longing to abolish a supremacy which creates an orderly legal basis, and does not offend territories which have no desire to be free from close connexion with the United Kingdom.

The chief immediate importance of the supremacy of Imperial legislation undoubtedly lies in the sphere

[1] The suggestion in Corbett and Smith, *Canada and World Politics*, p. 35, that the principle does not apply to the Irish Free State is based on a misreading of the Irish Free State Constitution Act, 1922, s. 3.

of merchant shipping. The issue, as we have seen, was for the time being adjusted by the Colonial Navigation Conference of 1907, but, though concurrence in the position then laid down was generally expressed, the action of the Dominions did not accord wholly with the principles which in theory they accepted. Moreover, the issue was brought prominently before the attention of the Commonwealth Government in June 1925 when the High Court ruled,[1] with unquestionable accuracy, that the Commonwealth Navigation Act exceeded in certain matters the powers of the Commonwealth Parliament. The Act, despite objections pointed out by the Imperial Government at different times, purported to vary the conditions as to engagement and discharge of seamen laid down in the Imperial Merchant Shipping Acts, and action was taken under it against the Union Steamship Company, which is an important New Zealand shipping company. The High Court had no difficulty in concluding that, as the vessel in question in the case was not engaged in the coasting trade, and was not registered in the Commonwealth, it did not fall under the powers of legislation granted by the Imperial Act to regulate these two branches of shipping. At the time, some indignation was expressed in the Commonwealth Parliament; why should an antiquated statute like the Colonial Laws Validity Act operate to hamper the free exercise of authority over the ships that visited Australia? Mr. Bruce hastily promised to investigate the anomaly and have it removed.

The Conference, of course, found that the issue was

[1] *Union Steamship Company of New Zealand* v. *Commonwealth*, 36 C.L.R. 130.

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not of the simple character believed by the critics of Imperial sovereignty in shipping matters. After prolonged study, it could only suggest the reference to a committee, on which India also should be represented, "to consider and report on the principles which should govern, in the general interest, the practice and legislation relating to merchant shipping in the various parts of the Empire, having regard to the change in constitutional status and general relations which has occurred since existing laws were enacted". The Conference records also the fact that it felt that the restrictions imposed on the shipping legislation of the Dominions were difficult to reconcile with the doctrine of the sovereignty of the Dominions, but they held also that it was "essential in dealing with these inequalities to consider the practical aspects of the matter. The difficulties in the way of introducing any immediate alterations in the Merchant Shipping Code (which dealt, among other things, with the registration of British ships all over the world) were fully appreciated, and it was felt to be necessary, in any review of the position, to take into account such matters of general concern as the qualifications for registry as a British ship, the status of British ships in war, the work done by His Majesty's Consuls in the interest of British shipping and seamen, and the question of naval courts at foreign ports to deal with crimes and offences on British ships abroad."

There are, in fact, very formidable difficulties in the way of giving to the Dominions an unfettered legislative power over British shipping. It is true that such a power would apply to foreign ships also, but there is a most serious difference in the two cases. In

fact, it would turn out that the Dominions when they imposed restrictions of an onerous kind would not be able to enforce them on foreign shipping without exciting a measure of resentment which would be translated into practical effect by the foreign powers concerned, in the shape of unfavourable fiscal treatment of Australian imports. The Dominions are sensitive to pressure of this kind, as can be seen from Mr. Bruce's obvious timidity in the face of possible Italian resentment of the desire to restrict Italian immigration into the Commonwealth, and the profuseness of the apologies tendered by him to the Italian Consul for a boyish prank on the part of some Queensland youths who tore down the consular flag. The Dominion legislation would, therefore, in practice, if not in law, be operative chiefly against British shipping, and there would thus be an unfair differentiation in favour of foreign trade. If, on the other hand, the Dominion insisted on rigorous enforcement of its regulations against foreign ships, the foreign power would probably, if not logically, retaliate by imposing difficulties in its ports on all British shipping, and not merely on the shipping of the offending Dominion.

Apart, however, from this important aspect of the case, the question arises whether there is any equity in permitting each Dominion to impose its own ideas of what is necessary on British shipping. The rule between foreign States—and the modern tendency of the development of Dominion status is admittedly towards giving them an autonomy in many matters comparable with the sovereignty of foreign States—is that they will not impose their own shipping laws on vessels which merely visit their ports in pursuit of

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trade. There are of course exceptions, and any State may insist on certain minimum conditions as to security being observed by all ships that visit her ports. The Imperial Parliament has adopted regulations as to load-lines and other matters to this purpose. But it has never insisted on rigid uniformity; instead, provision has been made in the Merchant Shipping Acts[1] providing for the acceptance of the regulations of other countries when they in substance are adequate, and regularly the shipping of most important countries is exempted from observation of British conditions when its own rules are sufficient. Moreover, and this is a matter of prime importance, the Imperial Parliament avoids, as far as possible, interfering in the more internal economy of foreign shipping, and, in special, it is opposed to legislation bearing on hours of work or pay or varying the terms of engagement. A similar policy is usually adopted in foreign countries in general. It is perfectly true that the United States is a bad exception to the ordinary rules of international comity in these matters, but there is nothing to be gained by exaggerating the difficulties of merchant shipping enterprise.

To the argument, that it was perfectly legitimate for the Commonwealth to require that British ships touching at Australian ports should comply with regulations additional to those imposed by Imperial legislation, the one and effective answer was given by the Colonial Secretary in reply to the Governor-General on September 18, 1908: "It is not desirable that a British or foreign ship engaged in an oversea voyage, which has complied fully with all the require-

[1] See the Merchant Shipping (Equivalent Provisions) Act, 1926.

ments of the Imperial Act at one British port, should have to comply with some additional requirements on the same subject matter at another British port, and it is important that there should be no doubt as to what the prevailing British standard at any moment is. . . . Moreover your Ministers will remember that if it is legitimate to Australia to make regulations with regard to oversea ships from the United Kingdom calling at Australian ports, it must be equally legitimate for the other self-governing Dominions and for the Crown colonies to make similar regulations, and that a hopeless confusion of authority would result from the exercise by these Dominions and colonies of such a power. . . . Your Government already have under the Imperial Shipping Act of 1894 full power to survey and detain any ship which there is any reason to believe is unseaworthy, and this power could be extended if thought necessary in order to secure safety of life." This answer really supplies the rationale of the Imperial position, and there seems to be no answer to it. The proper mode of advance is clearly by means of international agreement in order to secure the acceptance, generally, of principles to ensure safety of life at sea, and, though the Conference of 1913–14 failed ultimately to bring about uniformity, and the British legislation of 1914 to give effect to it has never become operative, the matter has again been taken into consideration and ultimately agreement will be achieved. The Dominions have no grievance if these international rules are accepted as sufficient by the United Kingdom and themselves, and if the United Kingdom claims that British shipping should not then be subjected to further conditions than those internationally accepted.

There are further considerations which tell against any hasty change in the present position. There is, it must be conceded, very serious doubt as to the power to enforce in British ports generally the regulations made by the Dominions for their registered vessels. It is clear, despite doubts sometimes expressed, that it is the purpose of the Merchant Shipping Act to give wide power in this respect to local legislatures, though the power is not very well expressed in s. 735 of the Act. That section simply authorises any colonial legislature, by Act confirmed by the King in Council, to repeal any provisions of that Act relating to ships registered in the possession, and is totally silent as to the actual measure of legislative power beyond this right to repeal. But it is a legitimate interpretation to hold that it is implied that the colonial legislatures can fill up the lacunae left by repeal, and provide a code for their registered shipping, and the Imperial Government definitely accepted this doctrine in 1907. But it is very difficult to say that any court outside the colony concerned can enforce the legislation of a colony, and it certainly appears proper that this lacuna should be made good, so that the Dominions may not find their authority defied by ships registered there which disregard their rules and do not return to the Dominion so as to fall under its power. Such ships might apparently defy all legislative control, on the score that, as registered in the Dominion, they are exempt from the Imperial Act, and that, as never visiting the Dominion, there is no court to enforce its enactments.

It is clearly necessary that nothing shall be done to upset the present principles of the registration of British shipping, and that, if changes are desired, they

should be made by common consent and embodied in an Imperial Act, which, under the new form of procedure, may be rendered applicable by enactment in the Dominions, thus preserving the doctrine of sovereignty. Nor can the Dominions desire that the Naval Courts at foreign ports[1] shall cease to have authority over their ships. The control of shipping is an extremely complex undertaking and it can be made effective only by the harmonious co-operation of both the Dominions and the Imperial Parliament. It is clearly impossible for the Dominions, save at ridiculous expense, to supply themselves with the vast apparatus of methods of control, and the services rendered by British Consuls in respect of merchant shipping are now rendered under Imperial legislation. It is clearly impossible also for any Dominion Act to confer on British Consuls powers over Dominion shipping which would be valid if questioned, save as the result of express authorisation by the Imperial Parliament, and in these circumstances there seems nothing to be gained by departure from the principle that the powers of the Consuls shall be derived from Imperial Acts. Less importance, perhaps, attaches to the argument based on the status of British ships in time of war; it is an issue which really depends on the decision ultimately arrived at as to the right of the Dominions to remain neutral in time of war, and is not essentially bound up with the powers of the Dominions as to merchant shipping legislation. But it is well to remember that what is conceded to any Dominion must be granted to the Irish Free State, and that its Parliament might, by unwise insistence on the exercise of its powers, impose grave inconvenience on British shipping.

[1] 57 & 58 Vict. c. 60, ss. 480-86; 6 Edw. VII. c. 48, ss. 67, 68.

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One other subject of Imperial legislation has lately excited controversy in the Dominions. The Admiralty jurisdiction of Colonial Courts was defined by the Colonial Courts of Admiralty Act, 1890, under which, in effect, the legislature of any British possession can declare any court of unlimited civil jurisdiction to be a Colonial Court of Admiralty. The powers of such a court are defined to be those possessed by the Admiralty side of the High Court in England, and, under the Act, many Admiralty Courts have been duly operative, for, even if no declaration is made, the Act provides that any court, in the possession, which has unlimited civil jurisdiction may exercise the powers of a Court of Admiralty. On this statute there has arisen a curious controversy in Canada, which has not wholly been stilled by the decision of the issue by the Privy Council in the cases of the *Yuri Maru* and the *Woron*.[1] The statute confers on Colonial Courts the jurisdiction which existed in England in 1890, and the question which arose was, whether, as there had been an important extension of that jurisdiction for England by an Imperial Act of 1920, the additional powers passed automatically to the Canadian Court of Admiralty. It was so held, in the first instance, in the Dominion, and just exception was taken to the position thus created. Canadian law had, it was asserted, been altered without the slightest reference to Canada, which had to ascertain the fact by studying Imperial legislation. It may fairly be said that if this had been the true state of the case, the Dominion complaint would have been more than fully justified, and no excuse could have been plausibly adduced for so serious a violation of Imperial

[1] [1927] A.C. 906.

comity. But the Privy Council had no difficulty in holding that the whole view rested on an error. The British Act of 1920 never purported or intended to deal with Dominion Courts, and, so far as any decision rested on the belief that it did, it was a clear case of misunderstanding.

There remains, however, the issue whether the Act of 1890 is to be interpreted as imposing on the Dominion Courts of Admiralty a restriction to the powers which were exercised by the British Admiralty jurisdiction in 1890, and as forbidding further advance. Here it appears that the Privy Council is prepared to regard favourably the extent of Dominion powers and not to interpret the statute too technically as intended to place limits on Dominion legislation. In the judgment in the cases in question, Lord Merrivale deliberately said, when expressing the views of the Privy Council, that "what shall from time to time be added (to the jurisdiction of colonial courts), or excluded, is left for independent legislative determination". There is no doubt that, in the context in which it is placed, the dictum applies to the legislative action of the Dominions, and the only meaning which can be assigned to the remark is that, in the opinion of the Privy Council, it remained open for Canada, despite the terms of the Act of 1890, to increase the jurisdiction of her courts in virtue not of the special authority given by the Act of 1890, but as a part of her sovereign legislative authority. In point of fact, Canada has already extended her authority by passing the Maritime Conventions Act of 1914, in which she conferred on her Admiralty Court jurisdiction *in rem* over claims for damages arising from loss of life, for such jurisdiction

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was assuredly not possessed by the British Admiralty Court in 1890.

The decision of the Privy Council has, rather paradoxically, not been received with unmixed enthusiasm in Canada,[1] where it has been contended that the dictum of Lord Merrivale does not mean what it clearly does mean, or is wrong. Now it is clear that the remark is a dictum, because it was in no wise necessary for the decision of the case, and a dictum even of so eminent a lawyer as Lord Watson has been examined and held to be inaccurate by the Privy Council. On the other hand, it is obvious, in view of the circumstances in which the case arose, that the attention of the Privy Council was fully directed to the whole of the issues, and that the observation is naturally interpreted in the Dominions as an invitation to their Parliaments to follow the example of the Imperial Parliament and increase the ambit of Admiralty jurisdiction. It would indeed be embarrassing and most unfortunate if action so instigated were to be held invalid by the Judicial Committee. It is perfectly true that a technical argument can be made out against the view of the Privy Council, but it is not to be regretted that, in an important constitutional issue affecting the extent of Dominion legislative power, the Privy Council should decline to take a narrowly limited view. If the view apparently held by the Privy Council is accepted, a further restriction at present existing on Dominion legislation will cease to be operative. Under Section 4 of the Act of 1890, colonial legislation on Admiralty jurisdiction must be reserved, unless it contains a suspending clause providing that it shall not come into

[1] See F. R. Scott, *Canadian Bar Review*, 1928, pp. 779-83.

effect until it has been approved by the Crown. If, therefore, legislation may be passed in virtue of the general legislative power of the Dominions, that legislation will be exempt from this provision, and one more restraint on Dominion freedom will be removed. If, on the other hand, the Privy Council view is to be ruled as inadvertent and to be explained away, then it is clear that a relaxation of Imperial control is urgently necessary, for there can be no justification in limiting the Admiralty jurisdiction of Colonial Courts to the boundaries set in 1890, when these have been enlarged for England. It is, however, in any case, desirable that the extensions made in the Dominions should not diverge from those accepted in the United Kingdom. In this, as in other matters, uniformity in the Empire is clearly most desirable, and involves no surrender of Dominion sovereignty if it rests on agreement.[1]

[1] No claim has so far been urged for the control of prize jurisdiction, now regulated by Imperial Acts, perhaps because it is bound up with the war prerogative.

CHAPTER XII

THE REPRESENTATIVE OF THE CROWN AND THE SOVEREIGN

THE Conference of 1926 had to deal with an issue which probably would not have been presented to it with the same force, had it not been for the unfortunate conflict between Mr. Mackenzie King and Lord Byng in the summer preceding its meeting. Lord Byng was asked by the Prime Minister for a dissolution of Parliament, when the Government, owing to the failure of steady support from the Progressive Party, was finding it difficult to carry on effectively, and had been challenged on the issue of the mismanagement of the customs department, which, in fact, had been far from properly controlled at one time, but which was in process of reform. Lord Byng held that it would be improper to grant a dissolution in these circumstances, which might enable the Government to escape a vote of censure, and the Prime Minister therefore resigned. Mr. Meighen then was asked to form a Government and did so, but was, of course, unable to carry on, and had to ask for a dissolution which the Governor-General had to accord, though the House of Commons was hostile to such a step, especially as the whole work of the session was wasted by the procedure adopted. The

election ensuing resulted in the defeat of the new Government, in a considerable measure owing to disapproval of the action taken by Lord Byng, for which, of course, the new ministry had to accept responsibility.

This unhappy ending to Lord Byng's otherwise most valuable career in Canada rendered it inevitable that the Prime Minister should raise two issues in which he had the support in special of the Irish Free State and the Union of South Africa. He desired that the practice of the Governor-General as regards requests as to dissolution should be governed largely on the lines applied in the United Kingdom. There is, in point of fact, no Dominion tradition comparable to that of the United Kingdom in these matters. In the latter, the necessity of keeping the Royal name out of political controversy, and of maintaining the Crown as absolutely above party politics, has resulted in the rule that the King will not refuse a Prime Minister the right to ask the people to judge between him and his opponents, and therefore, in 1924, His Majesty, with the cordial approval of all constitutional experts, declined to make difficulties about according to Mr. Ramsay MacDonald the dissolution for which he asked, although, if the same condition of affairs had arisen in a Dominion, the duty of the Governor-General, according to precedent, would rather have been to see if the Government could not be carried on without a dissolution. It is clear that there was much to be said for the doctrine that Dominion usage should conform to British practice.[1] It is not necessary to deny that in the past the discretion of the Governor was perfectly legitimate and even often valuable. But the growth

[1] Keith, *Imperial Unity and the Dominions*, chap. v.

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of Dominion status rendered such a doctrine as that held by Lord Byng obsolescent, and the opinion of the Conference was clearly in favour of the view now advocated by Canada.

It would clearly have been unwise to attempt to define, in any exact manner, the powers to be exercised by the Governor-General, and the sound principle was adopted of declaring that "it is an essential consequence of the equality of status existing among the members of the British Commonwealth of Nations that the Governor-General of a Dominion is the representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain". The exact application of this opinion remains, of course, for the Dominions to determine as they think fit. The amount of authority exercised by the King in the United Kingdom has varied, and must vary, with the personality of the Sovereign, his age, experience, and ability, and the qualities of the Prime Minister from time to time. The influence of a Governor-General must likewise depend on his personality, but his brief tenure—five years normally—of office, and the absence of the divinity that still envelops a King, naturally render it improbable that he can ever exert much influence on the acts of his Government, and in any event that influence must, to be effective, be totally private. It would, however, be a complete error to suppose, as has been done, that the assimilation of the position of the Governor-General to that of the King means the absolute loss of all personal decision. The strength of political tradition in the United Kingdom reduces greatly the probability that

personal intervention by the Sovereign will be necessary to safeguard the Constitution, but it is clear that if a Minister who had obtained one dissolution of Parliament were then defeated, and none the less asked for another, the King would be compelled, in the interests of the maintenance of the Constitution, to refuse his request. In the Dominions likewise the Governor-General must remain responsible in the last resort for the protection of the Constitution from violation by neglect of the fundamental rules of responsible government, though in them also any such violation seems remote from possibility.

The definition of the Governor-General's position in regard to the control of Dominion administration involved a change in one of his leading functions. Hitherto, the rule had been absolute that the chief channel of communication between the Governments of the Empire was the Governor-General, and in 1911, when Sir Joseph Ward proposed to substitute the High Commissioner as the more appropriate channel, the suggestion was not accepted by the other Dominions and was discouraged by Mr. Harcourt. But the demand for equality of status had secured in 1918 the acceptance of the view that Prime Ministers might communicate direct with the Prime Minister of the United Kingdom, and the further step was now taken of declaring that the use of the Governor-General in this way might be deemed inconsistent with his position as the representative of the King and give him the appearance of acting as an agent of the Imperial Government. It was accordingly agreed that, where desired, the mode of communication should be direct between Government and Government, though it was not proposed to

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vary the procedure in any case in which the Dominion concerned preferred to adhere to the older rule. Accordingly, in 1927 the new procedure was adopted in Canada, the Irish Free State, and the Union. At the same time the Conference insisted that it was an essential feature in any change or development in the channels of communication, that the Governor-General should be supplied with copies of all documents of importance, and, in general, should be kept as fully informed as is His Majesty the King in Great Britain of Cabinet business and public affairs. It is clear that this expression of Dominion opinion is little likely to be given effect to in practice. It has never been the usage in the Dominions to keep the Governor-General fully *au courant* with Cabinet business, and it is most improbable that he will be treated more favourably under a system in which he has lost his former most interesting function, that of serving as the intermediary between the British and the Dominion Governments. The change may be regarded with some regret, for it is impossible to deny that several Governors-General of Canada and of the Union served a useful purpose in this capacity, but it was clearly impossible to deny the desire of the Dominions, if they chose to press for its acceptance.

Though the Governor-General has ceased to be an agent of the Imperial Government, his position is still not that of the mere figurehead of a Dominion Government. The Constitutions grant to him the office of reserving Bills, and the right to give instructions as to reservation is vested in the King advised by the Imperial Government, and the Prime Minister of the United Kingdom did not fail to intimate immediately

after the Conference that this power was not surrendered, nor, as we have seen,[1] did the Conference arrive at any conclusion as to its abolition. It is obvious, moreover, that, apart from Royal instructions, the representative of the Crown would be bound on his own authority to oppose resistance to any legislative measure contrary to his duty of allegiance and fidelity to his oath of office and his position as representative of the Crown. Hence, General Smuts' dictum still applies; it would be impossible for the Governor-General to assent to any Bill which purported to destroy British sovereignty over the Union.

Moreover, it must be pointed out that the choice of the Governor-General does not rest, as is claimed in the Irish Free State, with the Dominion Government. The position is defined in Article 3 of the treaty of 1921 by which "the representative of the Crown in Ireland shall be appointed in like manner as the Governor-General of Canada and in accordance with the practice observed in the making of such appointments". This means, as Mr. Lloyd George explained on December 13, 1921, "that the Government of the Irish Free State will be consulted so as to ensure a selection acceptable to the Irish Government before any recommendation is made to His Majesty". Unquestionably, this principle is observed as regards all the Dominions, but the recommendation is that of the Imperial Government, with which the right to secure appointment, subject to the King's personal approval of his representative, necessarily lies. The rather comic insistence laid by the Irish Government on the occasion of the swearing-in of the second Governor-General of the Free State, when

[1] See p. 217 *ante*.

it was stated that he had been selected by the Free State Government for appointment, must, therefore, be reduced to its true value. If it is desired that the autonomy of the Dominions should be expressed by the removal of all Imperial intervention in the appointment, the constitutional method is clearly to amend the Constitution Acts, and it is by no means clear that such a proposal would commend itself to the Dominions in general. The case of the Irish Free State, in which the authority of the King has disappeared formally from the army, the courts, the civil administration, and his effigy from the coins and stamps, is always *sui generis*, and affords no precedent for Dominion feeling in general.

There remains in the Royal instructions to the Governor-General one provision imposing a personal responsibility which may easily be withdrawn in the normal case. Thus, in the instructions to the Governor-General of Canada applied to Lord Willingdon by his commission of August 5, 1926, it is provided in connexion with the delegation of the prerogative of pardon that: "Our said Governor-General shall not in any case, except where the offence has been of a political nature, make it a condition of any pardon or remission of sentence that the offender shall be banished from, or shall absent himself from, Our said Dominion. And we do hereby direct and enjoin that Our said Governor-General shall not pardon or reprieve any such offender without first receiving in capital cases the advice of the Privy Council for Our said Dominion, and in other cases the advice of one at least of his Ministers; and in any case in which such pardon or reprieve might directly affect the interests of the Empire, or of any country or

place beyond the jurisdiction of the Government of Our said Dominion, Our said Governor-General shall, before deciding as to either pardon or reprieve, take those interests personally into his own special consideration in conjunction with such advice as aforesaid." Historically these limitations are perfectly justifiable, but manifestly they have ceased to be compatible with the status of the Dominions, and their disappearance from the formal instruments, though doubtless unnecessary from a practical point of view, is theoretically essential.

The attitude of the Irish Free State, in demanding autonomy, was repeated in a curious and interesting form in the objections which were duly raised against the composition of the Council of State appointed by the King on the advice of the Imperial Government to exercise certain of the Royal functions during His Majesty's severe illness. The issue was reminiscent of the claim made during the period when Ireland was free from the paramount authority of the Imperial Parliament between 1782 and 1800 that it rested with the Irish Government and Parliament to decide what steps were to be taken during the incapacity in 1789 of the King to exercise the Royal functions. But there was, of course, no real parallel between the cases, and the Irish claim had no merits, though respect was paid to the wishes of the Irish Government to the extent that the ratification of the Pact to Renounce War and the letter of recall of the Irish Minister at Washington were signed only by the three members of the Royal Family on the Commission. It is clear that Canada, whose powers are the measure of those of the Irish Free State, neither could nor would claim any right to control the exer-

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cise of the right of the King to select the members of a Council of State appointed to relieve him of work during his illness, and that the Irish attempt to assert absolute equality with the United Kingdom, though it has the foundation of the careless phraseology of the Report of the Imperial Conference, is incompatible with the express declaration in the Act of 1922, confirming the Free State Constitution, that the Imperial Parliament reserves the right to legislate for the Free State in any case where it could do so constitutionally for the other Dominions.[1]

So again it is not within the power of the Dominions to affect the titles of the Crown, or to regulate the succession to the throne, or the regency. These are matters essentially appertaining to the Imperial Parliament, and the modification of this position, if it is to be achieved, must come from agreement by the Imperial Conference, to the next meeting of which the controversy of 1929 was duly relegated for consideration. It is clear that there should be agreement to such matters as the style of the Sovereign, and this was duly accorded at the Conference of 1926; the Royal title was altered to read "George V., by the grace of God, of Great Britain, Ireland, and the British Dominions beyond the seas, King, Defender of the Faith, Emperor of India", under the authority given by the Imperial Act of 1927, which also gave to the Imperial Parliament the official style of the Parliament of the United Kingdom of Great Britain and Northern Ireland. Any real dispute on such issues is hardly probable in existing circumstances, but it is clear that any substantial change in the succession to the throne would have to be made the

[1] 13 Geo. V. (Sess. 2), c. 1, s. 4.

subject of consultation with the Dominions, though the power to legislate is clearly vested in the Imperial Parliament, despite the claims of the Dominions to equality of status.[1]

[1] So in Ireland the succession rested on the English Acts, as Ireland was annexed to the Imperial Crown, but Scotland, as only in a personal union, determined its own succession in the Act of Security, 1704. See Ball, *Irish Legislative Systems*, pp. 80-82, 193.

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JUDICIAL APPEALS

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No part of the Report of the Conference of 1926 is marked by greater inconsequence than its pronouncement on the subject of judicial appeals. From the discussions it became clear "that it was no part of the policy of His Majesty's Government in Great Britain that questions affecting judicial appeals should be determined otherwise than in accordance with the wishes of the part of the Empire primarily affected". This principle, however, would have led to consequences which the Conference did not wish to face, and the conclusion was immediately qualified, just as the declaration of status was immediately robbed of its chief effect, by the reservation as to function. "It was, however, generally recognised that, where changes in the existing system were proposed which, while primarily affecting one part, raised issues in which other parts were also concerned, such changes ought only to be carried out after consultation and discussion." It is added that the Irish Free State, while waiving for the time the question of immediate change as regards the Free State, reserved the right to bring up the matter again at the next Imperial Conference for discussion in relation to the facts of that particular case.

The right of the Privy Council to hear appeals from all Dominion Courts was made statutory by the Judicial Committee Act, 1844, which was passed primarily to remove doubts whether the Committee could admit appeals from Courts in the Colonies which were not final Courts of Appeal, but incidentally opportunity was taken to state in absolute terms the right to admit appeals. The jurisdiction is, therefore, statutory though it originally rested on the prerogative, and under the Act the conditions as to appeals can be regulated by Orders in Council of a general type which have statutory force in the Dominions. Appeals lie either by reason of the code of conditions laid down in these Orders in Council—or in one or two cases by local Act —or by special leave obtained from the Privy Council. If such leave is given, the appeal is heard at a later date, unless it is found possible and convenient to combine the admission of the appeal with its hearing on the merits. The submission of the judgments of Dominion Courts to the revision of the Privy Council is unquestionably a distinct diminution of Dominion sovereignty, and the position of the Council has not been unchallenged. When the Supreme Court of Canada was created in 1875, it was intended to forbid appeals to the Privy Council, but the intention was defeated by the warning that the Act to create the Court might not receive assent, and as a result the Privy Council has been the final arbiter of the interpretation of the Dominion Constitution. In criminal cases, after the irritation caused in Canada by the hearing of the appeal in the case of Riel,[1] condemned for his share in the North-Western Rebellion of 1885, it was attempted

[1] 10 App. Cas. 675.

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to deny the right of appeal in criminal cases. The Imperial Government of the day was not interested in retaining the appeal, for the Privy Council is opposed to acting in criminal cases, and the Act was allowed to stand, for it escaped the notice of the advisers of the Crown that under the Imperial Act of 1844 the Canadian Act was void as repugnant to the general provisions of that Act. Not until many years later was it found necessary in Nadan's case[1] to pronounce finally on the issue, and the Privy Council then regretfully—seeing that the pronouncement could benefit no one and must arouse resentment at this over-riding of Dominion sovereignty—declared that the Canadian Act was ineffective to block the right to hear an appeal in a suitable case. The result, therefore, is that the right of the Privy Council to hear appeals from Canada is wholly unfettered.

In the case of the Commonwealth of Australia, as we have seen,[2] the position differs in one vital aspect. In all ordinary matters the position is precisely as in Canada. There lie appeals from the State Courts in the one case, from the provincial courts in the other, both as of right under the conditions laid down by Order in Council, and by special leave, when the ordinary procedure is not applicable or is not applied. From the High Court of the Commonwealth and the Supreme Court of the Dominion appeals lie only by special leave. But in cases which involve issues of the constitutional rights of the Commonwealth and the States or of the States *inter se*, no appeal can be brought to the Privy Council save on a certificate from the High Court.

[1] *Nadan* v. *The King*, [1926] A.C. 482.
[2] See pp. 54-6 *ante*.

Hence the final decision of constitutional issues in the Commonwealth has rested as definitely with the High Court as the interpretation of the Dominion Constitution has lain with the Privy Council. Australia, however, has, under the Constitution, a power denied to Canada, for it is expressly provided that the Parliament may make laws limiting the appeal even in non-constitutional cases, but no such Bill can be assented to by the Governor-General, who must reserve it for the Royal assent. This condition has helped to prevent any such Bill being brought forward in the Commonwealth.

In the Union of South Africa the Constitution has limited appeals to cases in which the Privy Council grants leave to appeal from a decision of the Appellate Division of the Supreme Court of the Union. The restriction is considerable as compared with the rules under the pre-Union régime, when appeals could come as of right and by special leave from several courts in the various colonies, and the effect of the new régime has been drastically to limit appeals. It is indeed apparent that it was the desire of the Union Government from the first that appeals should be infrequent, and on the whole this aim has been fairly well achieved. It must, of course, be borne in mind, in this connexion, that the law of South Africa is Roman Dutch law, and that on this branch of jurisprudence the Privy Council is not specially expert.

In the case of the Dominion of New Zealand and Newfoundland, the right to hear appeals by special leave or as of right is unfettered, and such appeals are regularly brought, though, as is natural, from such communities cases come but rarely to the Privy Council.

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The advantages and disadvantages of the appeal are obvious and have repeatedly been canvassed. Doubtless the appeal is costly and rather slow; sometimes the Privy Council has ignored local conditions and has misunderstood local law; it more often evades the most vital issues, and decides on some minor point, thus disappointing those who hoped by an expensive appeal at least to obtain general guidance. Far more serious is the complaint that it is a violation of sovereignty and inconsistent with national status. The advantages which it offers are not less clear. It serves in some measure to preserve uniformity in the interpretation throughout the Empire of the English common law, which, though eaten into by statute, is yet at the basis of the legal systems of Canada outside Quebec, of Australia, New Zealand, and Newfoundland. It is authoritative on the prerogative of the Crown in the Dominions, and from the Imperial point of view it has the merit of being able to enforce the supremacy of Imperial Acts, if they be called into question in the Dominion Courts. Above all it is impartial, and it can adjust with certainty the serious racial and religious issues which present themselves in legal shape from time to time in the case of Canada. Nor can it be denied that at its best it possesses an abundance of legal talent which it would be utterly unfair to expect to find in the highest court of any Dominion. Moreover, under a series of statutes, it has the advantage of including in its membership a number of distinguished Dominion judges whose services are regularly invoked whenever possible.[1]

It is natural that efforts have been made to meet

[1] Keith, *Imperial Unity and the Dominions*, pp. 379-88.

the attack on the Court, based on the argument of status, by the suggestion that it should be made an Imperial Court in the fullest sense of the term, so that appeals from the Courts of Appellate Jurisdiction in England, Scotland, and Northern Ireland should be brought before it. It would, of course, be strengthened to have a permanent representation of Dominion judges, and it might also serve to provide the material for a court which could act as an arbitrator if serious differences of opinion ever arose between the Governments of the Empire, such as would in the case of independent States be referred to the Permanent Court of International Justice. But these suggestions have never succeeded in achieving much support from politicians, whether in the United Kingdom or in the Dominions. The feeling of autonomy in the latter case militates against the project, while the legal profession of the United Kingdom is too conservative to contemplate with equanimity the disappearance of the present system under which the House of Lords is the final Court of Appeal. Hence the issue still remains essentially one of the extent to which effect can be given to the Dominion desire for the disappearance of the appeal.

A new element has, of course, been introduced into this controversy by the creation of the Irish Free State. The Government of the State has sought without cessation to destroy the appeal; it did not include it in its own draft of the Constitution and inserted it again merely by compulsion, and it has endeavoured to render the insertion of absolutely no account. The first case in which its purpose was effectively carried out was that of *Lynam* v. *Butler*,[1] where the point raised was merely

[1] *The Times*, December 8, 1925.

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that of the interpretation of the Land Act of 1923. An amending Act was at once passed in 1926 which decided the issue in the sense taken by the High Court and by the Supreme Court. It thus became clear that no private case need be brought to the Privy Council, seeing that the power of the legislature would be used to alter the law against the suitor. It remained to be seen what would be done in cases in which the interpretation of the Constitution was concerned, and the controversy already noted[1] over the interpretation of Article 10 of the treaty, in its relation to the salaries of officers retiring from the service of the Government, established the precedent that, if the Constitution is interpreted in a way displeasing to the Irish Government, the Imperial Government must either amend it or make good the loss to the Irish Government. The same result had been arrived at in effect, in the earlier case in 1924, when the Privy Council was asked to advise as to the procedure to be adopted under the provision of the treaty regarding the boundary between the two parts of Ireland. When that body announced that the Northern Government could not be compelled to nominate a representative to take part in the boundary arbitration, the Imperial Government hastened to undertake the amendment of the treaty to enable it to appoint the necessary arbitrator.

In the circumstances, it may seem strange that the Conference of 1926 gave only so uncertain a voice in favour of the abolition of the right of appeal in the case of the Free State at least. It is true that the Report was arrived at before the developments in the case of the Irish civil servants, but the position of the Irish

[1] See p. 190 *ante*.

Government was open and avowed; the Privy Council in its view was a useless and undesirable Court,[1] which was not to be allowed to operate in respect of Ireland. To agree to the abolition of its jurisdiction might have appealed to a sense of statesmanship, but this solution was rendered impracticable, or at least undesirable, by considerations affecting other Dominions. It was true, of course, that they had no direct interest in the retention of the Irish appeal; no idea of its importance as protecting the interests of Dominion subjects against injustice in Ireland could or did arise, and the motive was merely that of consideration of the position which would arise in the Dominions if the Irish request were granted. Australia was unable, it was clear, to speak for the States, and could not pledge herself to any view in favour of abolition of the appeal, which is a matter deeply interesting them also. The constitutional method of procedure, indeed, in the case of the Commonwealth, would have to be by means of altering the Constitution, and no Australian Government is at all likely to seek to move in this direction for the time being. Canada again was faced with the obvious fact that, whatever complaints Quebec might make when her legislation was ruled invalid by the Privy Council, or her claim to Labrador was overruled, she had no intention of losing the valuable protection of the Judicial Committee against any inroads on the integrity of her rights under the federal Constitution. Mr. Mackenzie King, therefore, was bound to refrain from securing a resolution in favour of the abolition of the appeal, and his prudence was attested to be just by

[1] Mr. Blythe, Dail, February 20, 1929: "a bad, unnecessary, and useless Court."

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the very clear intimation made by the Premier of Quebec on the conclusion of the Conference, that Quebec would not consent to any alteration of the Constitution of the Dominion. Nor had any of the other Dominions any serious grievance against the Council; the Union might object to the appeal on the score of status,[1] but the almost complete cessation in practice of South African appeals, and the fact that the Privy Council had never had to decide one adversely to any principle on which the Government has laid stress, prevented the matter being one of burning concern.

The retention of the appeal, therefore, rests in effect on the fact that in the Dominions, as a whole, there is no clear demand for its abolition, and that considerations of general policy render it unwise in the view of the British Government to concede hastily in form, at least, the Irish demand. It seems, however, that if the pressure continues the appeal must be renounced formally as it probably has been in practice. It is clearly inconsistent with autonomy, if that is pressed to its logical conclusion, and, while the other Dominions may not deem it wise or desirable thus to stress the point, they cannot be held to fetter the action of a Dominion that entertains a strong dislike to the court. The position is unfortunate; it would be very desirable if it could be arranged to carry out the suggestion of the reconstruction of the court as a final Court of Appeal for the whole Empire, for Irish judges could then take an effective part in the work, and contribute their valuable services to the task of judicial interpretation. Such a consummation, however, appears to be distant.

[1] Contrast M. Nathan, *Empire Government*, p. 56.

CHAPTER XIV

HONOURS AND FLAGS

In the region of the prerogative of honour the acquisition of Dominion autonomy remains far from perfect.[1] But the issue is one which in the nature of things cannot be treated as on a footing with the usual questions of Dominion autonomy. The essential distinction was clearly put by Mr. Chamberlain in his discussion of the issue with Sir Wilfrid Laurier, who asserted that no Canadian honour should be conferred without his recommendation. The Colonial Secretary pointed out that the contention of the Canadian Prime Minister was vitiated by the fact that honours were of Imperial validity, and were largely valued on that account. If they were merely local, then the local authority could decide, but that would reduce their value. He conceded, however, that political services in the Dominion should not be rewarded save on the recommendation of the Prime Minister, and that the latter should be consulted on any recommendations which the Governor-General should desire to put forward for recognition of services to literature, art, science, or public welfare in general. With this solution the matter rested, and the same régime gradually applied to the rest of the Dominions.

[1] Keith, *Responsible Government in the Dominions*, Part V. chap. xi.

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There was, however, difficulty in the case of the Australian States, for the Imperial Government naturally desired to use the advice of the Governor-General as co-ordinating the suggestions which the States made independently, and this point was adhered to despite the objections of the States. The procedure was successfully vindicated by the consideration that it was not the advice of the Commonwealth Ministry which was asked by the Secretary of State. He owed a duty to the Crown, and he must be allowed to select the instruments he thought best fitted to aid him in its performance.

The war of 1914–18 with its lavish bestowal of rewards excited fresh interest in the question, and rather unfortunate results from the Imperial standpoint were brought about by the sale of honours in the United Kingdom and the profuse scale on which minor honours were awarded. It is unnecessary now to apportion between the Government of Canada and the Government of the United Kingdom blame for the particular honours which stirred up in the Dominion a determined effort to prevent further honours being bestowed. In the beginning, in 1918, the movement was chiefly directed at hereditary honours—one particular peerage had excited the deepest indignation, and the Dominion Government sought to ease the strain by demanding officially control of the issue. It was suggested that no hereditary honours should henceforth be conferred in Canada, and that steps should be taken to prevent any honour granted to a Canadian British subject having hereditary effect. Other honours, save those in respect of war services or conferred by the King *proprio motu*, should be granted only on the advice of, or with the

assent of, the Prime Minister of the Dominion. But the Imperial Government would remain the authority to decide what classes and numbers of honours should be available for the Dominion. Ingenious as was this effort, it failed, and the Dominion by address in 1919 asked that the King might be pleased "to refrain hereafter from conferring any title of honour or titular distinction on any of your subjects domiciled or ordinarily resident in Canada, save such appellations as are of a professional or vocational character or which appertain to an office". It was also asked that the hereditary titles, which had been created contrary to the principles of the address in the past, should be made to terminate at the death of their holders. It is an interesting comment on the doctrine that the Dominions are autonomous and equal members of the British Empire that the second part of the request was rejected by the Imperial Government. It is true that it would have been more dignified for Canada not to prefer the request, but it is clear that the British refusal marks the imperfect character of the sovereignty asserted for the Dominions. The first part of the address has been acted on by the Imperial Government and the principle has been maintained despite efforts to persuade the Dominion that respect for the Crown demands the renewal of the system of awarding honours. The first of these was made in 1923 when it was supported wholeheartedly by Mr. Meighen but failed of acceptance. Even the Canadian bar which had been expected at its meeting in 1926 to approve the principle declined to adopt a resolution in favour of the renewal of the system, and, when a motion was brought forward in 1929 in favour of the resumption of the grant and most

unexpectedly it received the endorsement of the Prime Minister, the House of Commons, despite great efforts to influence members, showed its common sense by rejecting the proposal. No impartial survey of Canadian history can conceal the fact that the men who have done most for the Dominion have normally not been decorated. The system in Canada as elsewhere has worked unsatisfactorily, and there seems no reason to suppose that its revival would meet any public demand in the Dominion.

Of the other Dominions, the Union under the Government of General Hertzog in 1925 adopted a similar resolution against the conferment of any further honours. The motives which dictated this request were doubtless somewhat mixed, and one of them was probably dislike of anything which introduced a personal element of loyalty towards the Crown, which has often been regarded as one of the advantages of honours. Another factor in achieving the result was the attitude of the Labour Party, which, in the Union as in the Dominions in general, opposes the grant of honours, and thus stands in sharp contrast to the rather exaggerated fondness for honours exhibited by the British Labour Party during its tenure of office in 1924. The result, it must be admitted, is distinctly curious, for honours are bestowed on British subjects in Australia, New Zealand, and Newfoundland with general approval while they are rejected in the Union and Canada.

In the Irish Free State the constitutional usage of Canada is hardened, in its earlier form, into definite law. Article 5 of the Constitution definitely provides that no title of honour in respect of any services rendered in, or in relation to, the Irish Free State may be

conferred on any citizen of the Irish Free State except with the approval of, or upon the advice of, the Executive Council of the State. In point of fact the Executive Council has not thought fit to tender any such advice and is hardly likely to do so at any early date. It is noteworthy that the advice is made that not of the Prime Minister but of the Executive Council as a whole. In the United Kingdom the Prime Minister is the normal adviser of the Crown as to honours, but in the Dominions there is no absolute rule, and the Prime Minister necessarily consults with his colleagues, as he is bound to avoid the difficulties which might arise if it were found that he had ignored their wishes in such a matter.

Though the principle may now be said to be established that no honour can be conferred on a resident in a Dominion save with the approval of the local government, it is equally clear that the local government cannot tender advice on the question which is binding on the Crown. Honours are under the prerogative power of the Crown, and they can be granted only on the recommendation of a Minister of the Crown in the United Kingdom, who by this advice accepts the responsibility of the grant. The King has, indeed, his personal right to award decorations of the Royal Victorian Order, but no other Order, even for the Royal Family, can be granted save with the formal advice of the Prime Minister, or in certain departmental cases, the Minister in charge of the department.[1] As responsibility rests on the Minister, he must secure that the grant of honours to the Dominions must not be on a scale which is unduly favourable to any one Dominion as compared with other Dominions or the United Kingdom. More-

[1] Parliamentary Paper, Cmd. 1789.

over, it is recognised that the King has a quite exceptional right to a voice regarding the use of the prerogative in this regard, and the late King Edward VII. was notoriously critical of long honours lists. The case of honours, therefore, remains one in which the sovereign control is necessarily divided. It rests with a Dominion to decide whether any recommendation shall be made for honours; it rests with the Imperial Government to decide—subject to the King's approval—how far these proposals from the Dominions can receive effect.

There is, it may safely be said, no reason whatever why a purely local honour should not be created by local Act, nor, indeed, why the King should not be deemed to be able to delegate part of the prerogative power, so that local honours may be conferred by the Governor-General. It may safely be said that such local honours would not be ranked as of high value, and that the holders would resent deeply the fact that they would be regarded in the United Kingdom with the same easy-going contempt that attaches to foreign titles. It is significant that, though the right of the Dominions to issue medals has long since been recognised, the regular practice is, and has been, to obtain the Royal approval, so that these medals may have validity throughout the Empire. In a similar manner the Dominions have steadily striven to secure for the use of the title Honourable accorded to Ministers, judges, and a few other persons, the Royal sanction and validity throughout the Empire. The result has, undoubtedly, greatly increased the value of these honours, and the Canadian House of Commons, while opposed to honours proper, expressly approved the use of the styles Honourable and Right Honourable. The latter style remains re-

stricted to Imperial Privy Councillors, though it was desired by Sir John Macdonald to secure the title for the Privy Council of Canada. There are, it is obvious, certain objections to the grant of the style to members of somewhat numerous and fleeting Dominion Cabinets, but the question may be revived as an issue of equality.

There is, in strict theory, nothing to prevent Dominion legislation to control the use of titles in the Dominions, and the suggestion was at one time made that, if the Imperial Parliament would not give effect to the desire of the Canadian House of Commons for the passing of legislation to terminate the hereditary effect of titles granted to Canadians, it might at least be made illegal to use the hereditary title in the Dominion. It would, clearly, be impossible for the Imperial Government to take exception to such a step as an encroachment on the Imperial sphere, for it might well be a matter concerning the peace, order, and good government of Canada. But obviously it would be a distinctly futile procedure, and Canadian common sense has been content to rest upon the accomplishment of the main demand that the bestowal of honours on Canadians shall cease.

The regulation of precedence, which once raised difficulties, has long since been left to the Governors-General and their Ministers. The approval of lists of precedence by the Crown is a sign of the Royal interest in these matters, and the recognition of its position by the Dominions. But, though friendly discussions of precedence have been carried on between the Imperial and the Dominion Governments, it is clear that no constitutional issue now exists. The Dominions could, of course, at any moment, regulate matters by legislation,

but this is not necessary. On one point alone has there been a curious insistence on disregarding the wishes of the Dominions. The Colonial Regulations, when applicable to the Dominions, still maintained the rule that British subjects who enjoy by birth or by dignity conferred by the Crown do not lose that precedence when resident temporarily or permanently in a colony. The rule naturally was a dead letter in the Dominions, and the edition of the Colonial Regulations for 1928 no longer has any application to Dominion affairs.

The question of flags in the Dominions has been given a rather artificial importance as a subject of conflict between Dominion and Imperial views, for in point of fact, though the question has raised serious disputes locally, it has seldom caused much tension between the Governments concerned. The Union Jack is the flag of the Empire, because it is the national flag of the United Kingdom. It is the creation of a Royal Proclamation of 1801, issued in virtue of the Act of 1800 for the Union of the United Kingdom of England and Scotland with the Kingdom of Ireland, and it replaced the flag created for the United Kingdom of England and Scotland by the proclamation of Queen Anne under the Union Act of 1707. As the Imperial flag it can be displayed throughout the Empire, and any deviation from it has been the result of special circumstances.

For use on ships belonging to British subjects the red ensign is prescribed by Section 73 of the Imperial Merchant Shipping Act of 1894, and the use of any other national ensign, except the Union Jack, or of the colours or pendant of His Majesty's ships, is an offence punishable by a fine of £500, unless warrant is granted

by the King or the Admiralty for the use of such a flag. This statute cannot be varied by Dominion legislation, but ample provision has been made, by the grant of warrants from the Admiralty, for the adoption by each Dominion of a distinctive flag when desired for use on its merchant shipping, while, as has been seen,[1] the flag to be used by the Dominion navies was settled by agreement at the Imperial Conference of 1911. The difficulties which have arisen in the Dominions have concerned not this issue, but that of the use of a distinctive flag on land.

It is clear that, in the absence of any law regulating the use of flags on land, it is open to any Dominion Government to use any flag that it deems appropriate. Usage has changed from time to time; thus, in the case of Canada, not long after federation, the use of the red ensign with the badge of Canada in the fly was adopted officially and the use was maintained until 1904, when it was determined to substitute the Union Jack. The issue has since been revived, but the proposal of Mr. Mackenzie King's Government to consider the creation of a new flag failed to excite any enthusiasm and the project has been shelved for the time being. The issue is clearly not one of principle as between the Imperial and the Dominion Governments, but a matter of feeling among the people of the Dominion. The Union Jack is valued by many as symbolising the unity of the Empire, and connexion with the mother country, while a new national flag appeals to those who have no historical ties with the United Kingdom and are more concerned to emphasise the special nationality of the great Dominions.

[1] See p. 157 *ante*.

In Australia the problem of unity with the Empire and distinct personality has been solved apparently with perfect satisfaction to all concerned by the general adoption, on the wish of the House of Representatives of the Commonwealth in 1904, of the British blue ensign with a seven-pointed star in the lower staff quarter and the Southern Cross in the fly. Its adoption, by military orders, as the flag to be used by the troops, and its use in the war of 1914–18, has rendered it more than ever the national Australian flag, and it has been regularly used for the buildings owned by the Commonwealth Government in the United Kingdom and elsewhere. The design was definitely submitted to the King for his approval, and His Majesty's acceptance of the design was advised by the Secretary of State for the Colonies, and this principle was applied to the red ensign for use on the mercantile navy of the Commonwealth by the Admiralty warrant of June 4, 1903. The ready acceptance of the position adopted by Australia was doubtless facilitated by the case of New Zealand. The national flag of that Dominion was determined by an Act in 1901, which, after reservation, duly received the Royal assent in 1902. It is composed of the blue ensign, having on the fly the Southern Cross as represented by four five-pointed stars with white borders. There was some hesitation on the part of the Imperial Government to sanction the Act, but that arose merely from the fact that in its original proposal the Government had proposed to make the flag the national flag for all ships as well as for use on land. This would have run counter to the Admiralty policy which restricts the use of the blue ensign to Government ships, and the Act, as finally allowed to take effect,

declared the flag to be recognised for general use on shore and on all vessels belonging to the Government of New Zealand, or which are, from time to time, permitted by warrant from the Admiralty to use the flag.

It is clear, therefore, that in seeking to establish a national flag for the Union in 1925–7[1] General Hertzog was not striking out on an entirely new line of action. But his insistence that the Union Jack should not form the foundation of the new flag was a definite departure from the rest of the Dominion precedents and was only inspired by the desire to claim that the Union possessed sovereign independence. The issue was embittered by this undercurrent of hostility to the British element in the Union, which was manifested repeatedly on the part of the Nationalist Party, and it was most fortunate that at the end national sanity prevailed and a fatal conflict over the matter was avoided. "I wish to express", telegraphed the King when the issue was settled, "my heartfelt satisfaction at the solution of the flag question, and I earnestly trust that the spirit of tolerance, conciliation, and goodwill may continue to animate all parties and unite them for the common weal", an aspiration which, unhappily, events have not proved to be justified.

The case of the Irish Free State is, as usual, *sui generis*. The adoption of a distinctive flag there was carried out without any reference to the Imperial Government, and has been maintained on this basis.[2] The plan of passing an Act to provide definitely for the adoption of the national flag would appear natural,

[1] See p. 60 *ante*.

[2] D. Gwynn, *The Irish Free State*, pp. 61-5. The true colours are orange, white, and green; the origin of this admixture is obscure.

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but the suggestion has been firmly negatived by the Government, for no very obvious reason, and the flag has been recognised on several occasions formally by the Government of the United States. The Free State, however, is still subject to the terms of the Merchant Shipping Act, 1894, which it is powerless to alter, a fact which may account for reluctance to legislate. Such legislation would necessarily have to respect the rules laid down by the Imperial Act, as was the case in the New Zealand legislation, or would be *ultra vires*.

PART III

THE DEVELOPMENT OF EXTERNAL SOVEREIGNTY

CHAPTER XV

THE EVOLUTION OF THE TREATY POWER

In Lord Durham's time the control of the Imperial Government over the external affairs of the Dominions was complete and unquestioned. Even in the period of very wide colonial independence in the American colonies, the Crown had not parted with its authority in this regard. The Governors and the Proprietors were permitted no more than the minimum authority necessary to defend the colonies from the hostility of the Indian tribes, whether by military action or by the conclusion of treaties, and the tribes were at no time treated as being States of international status.[1] The presence of the United States on the Canadian boundary rendered the strict exercise of Imperial authority of special importance, and the issue was necessarily very vividly present to the mind of Lord Durham, who had to deal with the difficult and delicate effect on relations between the Empire and the United States excited by the Canadian seizure and the destruction of the *Caroline* as a precautionary measure against invasion. It was, therefore, inevitable that he should reserve the whole subject of relations with foreign Powers, and it is significant of the general recognition of the

[1] See E. B. Greene, *The Provincial Governor*, pp. 106-10.

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justice of this outlook that Joseph Howe, in his letters to Lord John Russell on responsible government, countered the latter's arguments against the concession of that system, which were largely based on the issue of foreign relations, by reiterating the fact that the colonies did not demand any powers in these matters inconsistent with final Imperial control. The colonies expected the Imperial Government to give full consideration to their needs, but they conceded the final voice to the sovereign authority in the Empire.

In point of fact it proved, on the whole, fairly easy in the period before the war of 1914–18 to combine the recognition of the final authority in external affairs of the Imperial Government with the claims of the colonies. By 1914 it may fairly be said that the system had been moulded so that in matters commercial the Dominions had all the powers which they desired or required, and that in matters more directly political they had achieved most of what they wished and what could be obtained for them, and that future advance was open to them without any objection of the Imperial Government but was retarded by their own reluctance to engage themselves in matters which seemed of remote interest. It was, in large measure, the war that awakened the Dominions from their tendency to prefer a policy of isolation and freedom from entanglement in foreign affairs. They then realised that they could not remain unaffected by any great international upheaval, and they drew the inevitable conclusion that they must undertake the obligation to take a real interest in the process of international affairs.

The steps of the development may be traced under the heads of commercial and political affairs.[1]

I. *Commercial Negotiations*

It was natural that the British Government should, in its early treaties, have stipulated for the inclusion in their benefits of the whole of the British possessions, and this plan was adhered to long after the grant of responsible government, without eliciting any protests from the colonies. Thus, the colonies were included in a treaty with Switzerland in 1855, with that with Russia of 1859, and in that with Austria and Hungary in 1876. What is still more striking, and was to prove of importance later, was that in the treaties with Belgium in 1862 and with the German Zollverein in 1865 the Imperial Government not only included the colonies, but was generous enough to give to these States as favourable treatment in the colonies as was at any time conceded to British imports into them. It was not until 1877 that representations from Canada induced the Imperial Government to announce a change of policy. Henceforth there would be no automatic inclusion of the self-governing colonies in the treaties negotiated by the United Kingdom, but they would, if possible, be given the opportunity to adhere within a period of two years. This was obtained first in 1882 from Montenegro, and then in 1883 from Italy, and the practice since has been uniform. It was later supplemented by the sensible plan of consulting the Dominions, when undertaking commercial negotiations, as to whether they desired any special concessions which

[1] Keith, *Responsible Government in the Dominions*, Part V. chap. v.

might be borne in mind when the issues were being discussed, and Newfoundland in special has been benefited by Imperial action in this regard.

It soon was felt in the Dominions that the restrictions imposed by the older treaties were burdensome, and the demand arose for relief from restrictions which had been imposed without consultation with the colonies. The vital issue arose as regards the treaties of 1862 with Belgium, and of 1865 with the Zollverein, for at the Ottawa Conference of 1894, convened by Canada and attended by most of the self-governing colonies, the demand was voiced that, as a preliminary to Imperial preference, there should be abolished the restrictions which compelled the concession to these two powers of any benefits given to British imports into the colonies. If these two treaties had been confined in their effect to the countries concerned, the issue would perhaps have been less serious, but, by virtue of the most-favoured-nation clause in many other treaties, the same privilege was assured for nearly all those countries which were competitors with the United Kingdom in the colonial markets. The request of the Ottawa Conference was not, however, held valid by the Imperial Government. It was ruled that the disadvantages which would arise from the termination of the treaties in question would probably outweigh anything to be gained by preferences given by the colonies. In estimating this attitude, it must be remembered that there was then no definite assurance of any concessions by the colonies, and it was certain that Germany would resent the proposed termination of the treaty. The situation changed in 1897, when the issue was once more raised, at the Colonial Conference

of that year summoned by the Imperial Government. There was now the solid assurance of the Canadian determination to grant a preference, and the undoubted fact that under the treaties it could not be conceded effectively, and accordingly the necessary steps were taken to terminate the treaties in 1898. The event proved that the fears of German retaliation were not unfounded. To the United Kingdom and the rest of the Empire Germany indeed granted favourable treatment, but she penalised Canada. In retaliation Canada imposed a surtax on German imports, and a long tariff war ensued, which was terminated only by German surrender in 1910.

The decision of 1898 was followed by a most prudent step. It was decided that, if possible, foreign countries should be induced not merely to permit the separate adherence of the colonies to commercial treaties, but also their separate withdrawal, on due notice, without impairing the validity of the treaty. This would obviate the disagreeable necessity of terminating a treaty for the whole of the Empire. The concession was first gained from Honduras and Uruguay in 1899, and since then separate adherence and withdrawal have been asked for and conceded in all commercial treaties. A further concession has of late been asked for and often given; if a Dominion gives most-favoured-nation treatment to any foreign country, that country binds itself to accord such treatment to it, so long as the condition exists. This one-sided arrangement for the benefit of the Dominion has naturally been declined by Germany, but most States have accepted it.

There remained the question of obtaining power for the Dominions to withdraw separately from treaties

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into which they had entered deliberately by accepting obligations under clauses permitting separate adherence. The matter, in various forms, was raised at the Colonial Conferences of 1902 and of 1907, and the Imperial Conference of 1911, and, very obligingly, the greater number of Powers affected have consented to allow the modification of their treaties in order to confer on the Dominions the right of separate withdrawal, though Italy insisted that the treaty of 1883 must stand as a whole, and the rest of the Empire did not desire to terminate it merely to meet the wishes of Australia.

The system thus created is obviously one of special advantage to the Dominions, which are given rights without responsibilities save such as they deem advantageous. But the matter is even more to their advantage under the British treaties. According to the claim of the British Government, to which foreign Powers have by acquiescence consented, the privileges which commercial treaties secure for British subjects apply to such subjects wherever they may be domiciled or resident, and therefore Dominion British subjects are entitled to them in the fullest measure, although the treaty itself is not accepted by the Dominion or has been brought to a close by the withdrawal of the Dominion from its obligations. The benefits thus secured are, even under the latest type of treaty, very important. Thus, that with Germany of 1924 gave to all British subjects most-favoured-nation treatment in Germany in respect of the acquisition of property, and the same rights as nationals in respect of its disposal or export or inheritance. Similarly, most-favoured-nation treatment was conceded as regards entry and

residence and exercise of professions. British subjects are excused from military service, and from administrative, municipal, and judicial functions other than jury service, and are exempt from forced contributions in lieu of military service and military exactions, other than those connected with the ownership of land or compulsory billeting. The only disadvantages which accrue to Dominion British subjects affect the produce of the Dominions, which is not granted the same favourable treatment as that granted to the United Kingdom, unless the Dominion accepts the obligation of the treaty. The position is very greatly in favour of the Dominions, and it would be impossible to deny that Japan, for instance, might well feel it inequitable that Australians should enjoy free right of residence in Japan, while Japanese are scarcely admitted to the Commonwealth. But it can hardly be doubted that the rights in question could not be refused without alteration in the treaty, and this fact should be reckoned among one of the very real gains to be derived from the British Imperial tie to the Dominions. The exact effect of the refusal of a Dominion to accede has not, so far, been seriously questioned by any foreign Power; it is doubtless a matter which would have to be referred to the Permanent Court of International Justice in such a case as that of Siam, where that Court is contemplated as the authority to resolve doubts as to the interpretation of the latest treaty with the United Kingdom (July 14, 1925).

But the advantages to be gained by general treaties are not those in which the Dominions are specially interested. Local conditions naturally render it desirable to seek special concessions for important exports,

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and to earn them by corresponding concessions on selected foreign imports. The attitude of the British Government in these matters was, from the first, above reproach. The claims of the colonies were candidly conceded the moment that the old régime of the navigation system was departed from, and the needs of Canada in consequence of the loss of preference on the adoption of free trade as a British policy were frankly recognised. It was not the fault of the British Government that the United States took so long to make up its mind to accord a measure of reciprocity as it did in 1854, largely thanks to the diplomacy and the champagne of Lord Elgin's mission. No better representative of Canadian interests than that diplomat could have been chosen, though the way had been prepared by the efforts of the British Minister and a number of unofficial promoters of closer commercial relations. The principle that Canadians should take the essential part in the negotiations, though, of course, in association with the British representative at Washington, was readily agreed to by the British Government in 1865, when the question of securing a renewal of the Reciprocity Treaty was under consideration. The attitude then adopted was followed by the association of the Prime Minister of the Dominion in 1871 in the conclusion of the Treaty of Washington, which deeply affected Canada, and for a time restored harmony in respect of the relations between the United States fishermen, exercising their rights under the unfortunate convention of 1818, and the Dominion Government. In 1874 futile efforts were made by Mr. George Brown to secure a commercial agreement from Washington. The matter was definitely regulated in the years from

1879, when the efforts of Sir A. Galt and Sir Charles Tupper were directed to the issue. Canada then, under its new tariff policy, was anxious to open negotiations for concessions with Spain and other foreign countries, and the Foreign Office was willing that the attempt should be made. It was, however, laid down in the first instance in 1879 that the position of the Dominion representative was to be that of a subordinate assistant of the British representative, but that claim was later abandoned under the insistent pressure of Sir Charles Tupper, and it was agreed in 1884 that, if a treaty were concluded, he could sign it together with the British representative on behalf of the Crown. In point of fact the negotiations came to nothing, but in 1893 a treaty was actually arranged with France which Sir C. Tupper duly signed together with the British Ambassador and Sir J. Crowe, just as he had signed in 1888 together with Mr. Chamberlain the abortive Treaty of Washington with the United States. The French treaty was essentially the work of Sir C. Tupper, and the precedent set was followed in 1902 when Sir R. Bond, Premier of Newfoundland, was allowed to sign a convention with the United States in conjunction with the British Ambassador, but, unlike the French treaty, this instrument failed to receive ratification.

A further advance was made in 1907 and in 1909. The Canadian Government was anxious to arrange a more comprehensive treaty with France, and for this purpose it deemed direct negotiations at Paris with the French Government essential. It proposed that the British Ambassador should not take part in these negotiations, the details of which were essentially Canadian, and this claim was readily conceded by Sir E. Grey on the dis-

tinct condition that the British representative must sign any convention finally agreed to after it had been approved by the British and the Canadian Governments, and that ratification should take place after final examination by both Governments. This procedure was resorted to even by Canada as late as 1923, when the treaty with Italy was signed at London by Canadian and British representatives, and the procedure was defended by Mr. Fielding as eminently satisfactory.

The conditions regulating the treatment of these issues were explicitly stated in connexion with the proposed negotiations between Canada and the United States in 1865, and they were reiterated by Lord Ripon on June 28, 1895, when expressing the views of the Imperial Government on the discussion of this issue at the Ottawa Conference of 1894. The Imperial Government was perfectly willing to permit separate negotiations, but laid down certain conditions regarding them. The mode of procedure must secure that the interests of the Empire as a whole must be duly considered, though it was recognised frankly that the commercial and financial policy of the United Kingdom could not be regarded as the standard by which negotiations were to be judged. But the concessions made to any country in a treaty must at once be extended to any other country which was entitled to most-favoured-nation treatment, and the Imperial Government must be satisfied of the legislative arrangements to secure this end before ratification could be accorded. Secondly, it was essential that any advantages conceded to any foreign country should at once be extended to all parts of the British Empire: thus, in 1892, the Canadian Government had made it

clear to the United States that it would not consent to any arrangement under which that country would obtain favours denied to the United Kingdom, and, conversely, the Imperial Government had refused to ratify the proposals made by Sir R. Bond that Newfoundland should accept from the United States concessions denied to Canada in return for a discrimination in favour of United States imports over those from the Dominion. Thirdly, no colony should seek an advantage from a foreign State which would operate seriously to the disadvantage of the United Kingdom or some other part of the Empire. Any case where such a possibility arose should be the subject of earnest consideration and balancing of the loss to the Empire as against the possible gain to the colony concerned. These conditions were carefully observed, save in the case of the Newfoundland agreement with the United States of 1902, when, by an accident, the British Ambassador consented to the insertion of a clause giving to the United States national treatment for certain imports into the colony. This provision did not technically violate the principles of 1895, but by preventing the grant of any British preference it was deemed to have run counter to the spirit of Empire policy, and it is possible that the Imperial assent to the treaty might have been withheld; the difficulty never arose, as the treaty was rejected by the Senate, which deemed it too favourable to the Newfoundland fishing industry.

The rules laid down in 1895 expressly negatived the idea that the colonies should be granted any formal power of the making of treaties independently of the United Kingdom. This project was first pressed seriously in the case of New Zealand and the Australasian

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colonies in the discussions between 1869 and 1872, to which reference has been made, of the possibility of tariff preferences between these colonies. Connected with this issue was the question whether the colonies ought not to be allowed to enter into special agreements for themselves with other States, but the Imperial Government negatived the proposal and the issue passed off with the concession to the colonies of the right of granting inter-colonial preferences by the Act of 1873. The experience then achieved by the colonies of the difficulties of coming to any agreement for preferences among themselves doubtless did something to diminish the eagerness for the treaty power, and it was not pressed at the Ottawa Conference, so that Lord Ripon could safely say that there was no real demand for the grant of an authority which would result in the weakening of the ties of Empire. None the less the idea lingered on and was carried out in substance, though not in form, in Canada in 1910. The long tariff war with Germany, waged as the result of the British preference given by Canada and the withdrawal of the Empire from the Zollverein Treaty of 1865, had gone steadily in the favour of the Dominion. The astute statesmen of Germany recognised facts, and decided to capitulate, and the capitulation was intimated through the German Consul-General. In return, by Order in Council of February 15, 1910, under the Customs Tariff of 1907, the surtax levied on German imports was abandoned. This was followed by informal negotiations with Italy through the Royal Consul, to which effect was given by another Order in Council, and, similarly, concessions were made to Belgium and the Netherlands. This series of informal arrangements was completed by an agree-

ment with the United States, under which the Dominion secured the benefit of the normal rates of the Payne-Aldrich tariff.

These agreements were noted by the Imperial Government, but as they were all carried out in the Dominion by mere legislation, and no formal treaty was considered necessary, no exception was taken to the procedure adopted. But the matter was carried very much further by the decision adopted by Canada to renew the negotiations for reciprocity with the United States which had for generations fascinated the minds of Canadian statesmen. Accordingly, on January 21, 1911, there was signed at Washington by two Canadian Ministers an agreement with the United States Secretary of State which provided for a considerable measure of reciprocity in trade. Neither party desired a treaty; both preferred that there should merely be an understanding, which would obviate the necessity of securing the two-thirds majority of the Senate requisite in the case of a treaty. The agreement was concluded without the intervention of the Imperial Government save in so far as the Ambassador presented the Canadian Ministers to the Secretary of State. Nothing was accepted by the Dominion Government which it thought likely to affect injuriously British interests, but naturally it had inadequate information on this point, and it is possible that certain classes of English exports to Canada would have suffered severely from the carrying out of the scheme. The President of the United States held that the arrangement might prove an important factor in diverting the current of Canadian national life, and more indiscreet supporters of the measure hailed it as a masterstroke in the policy of securing

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Canada for the United States. In the Dominion it was at first gladly welcomed by practically all sides of public opinion, for all the party leaders had at one time or other favoured closer relations with the enormous American market. But the policy of speedily obtaining the necessary legislation was not adopted, and opinion gradually turned against the proposals, largely under the influence of the fear lest the Dominion might be attracted into too close relations with the United States. The cry of loyalty to the Empire which had served Sir John Macdonald so well in his last electoral campaign was revived by the Conservatives, and when the Ministry decided to test the opinion of the country by a dissolution, the rout of the Government forces was decisive. The episode undoubtedly had the effect of discrediting this informal type of negotiation for some time, and when the matter was to be revived after the war, Canada had ceased to desire to arrange matters informally, but desired to have full control of the treaty power.

Commercial treaties essentially require in the British Empire legislative provisions to give them effect, and the rule from the first was that such legislation would normally be passed in the colony concerned, though the Imperial Parliament might have to step in to implement undertakings which the colonial legislature might hesitate to fulfil. But it is entirely a matter of domestic concern which legislature acts, and no foreign Power has any right to demand that the Imperial Parliament must take the requisite steps. A heated controversy on this issue was carried on by Mr. Bayard, United States Secretary of State, in 1886, in connexion with the fishery controversy between Canada and the United

States. He contended that Canada was non-existent from the point of view of the United States, and that the Imperial Parliament alone could and should carry out any obligations incumbent on the Crown. The British reply absolutely repudiated the claim, and pertinently pointed to the fact that in both the reciprocity treaties of 1854 and 1871 it was expressly provided that the provisions were to be approved by the provincial legislatures concerned. The United States' claim then dropped, and equally firm was the British rejection of the French claim in 1891–2 that France was entitled to demand that the Imperial Parliament should legislate to protect the rights of her fishermen in the waters of Newfoundland. The British Government readily admitted the obligation of securing these rights, but insisted that the method of doing so must be left to its discretion. In point of fact a Bill was made ready, and would have been introduced and passed through Parliament to safeguard the position, if the Newfoundland Government had remained intransigent, but, in face of this insistence, that Government capitulated. In 1907, however, it became necessary to issue an Order in Council under the Imperial Act of 1819,[1] passed in order to give authority for carrying out the treaty of 1818 with the United States, according to the American fishermen certain rights in the waters of the colony. But in the following year matters were restored to normal, and the Order in Council was forthwith revoked.

[1] Not under the prerogative as held in Corbett and Smith, *Canada and World Politics*, p. 26, n. 1. The Crown has lost all prerogative right of legislation by granting a representative constitution in 1832.

II. *Political Negotiations*

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During the pre-war period the colonies were regarded as entirely without foreign relations proper, and accordingly no diplomatic agents were accredited to them, and foreign Governments were represented only by consular officers. The appointment of these officers was, of course, subject to the approval of the Crown, and this was accorded by the Imperial Government without any intimation to the Dominion concerned in the case of consuls *de carrière*, on the obvious ground that it would be impossible for a Dominion Government to take exception to a regular consular officer who had had no connexion with the Dominion, and could, therefore, not be unacceptable on personal grounds. In other cases, the consent of the Dominion was regularly asked before recognition was accorded, on the very sensible ground that local residents might be open to some objection which the Imperial Government could not guess. As we have seen, there arose in Canada a slight tendency for these officers to go beyond the limits of purely consular functions, and the Prime Minister of the Dominion went so far in 1910 as to speak of them as performing quasi-diplomatic functions, which might justify the raising of the question of their precedence. But this project did not mature, and consular officers remained devoid of formal diplomatic status, though not rarely rather important business was carried on through them. Thus the Canadian Government in 1907 listened with courteous attention to the representations made through the Japanese and Chinese Consuls regarding the damage done to the property of their compatriots by the rioting at Van-

couver. The Dominions, for their part, were represented abroad by Trade Agents or officers of similar status, and for diplomatic or consular action relied on the services of the British diplomatic and consular services, which were placed readily and gratuitously at their disposal. The chief duties of the Washington Embassy soon became recognised as the dealing with Canadian affairs, and Canadians made free use of the consular officers in the various parts of the United States, as did Australians of those stationed in the French territories in the Pacific.

On foreign policy in general the Dominions had no desire to express their views, but on the other hand they expected matters which affected their special interests to be adjusted according to their aspirations. The Imperial Government had a most difficult part to play. It was concerned with the great European problems of the day, and with its delicate relations to the United States. It was conscious that no military or naval efforts which could be made by the Empire would avail to protect Canada from an attack by the United States, which would at least do infinite damage and might prove impossible of effective retaliation. In a very critical period between 1880 and 1886 it was hampered by its commitments in Egypt, and by the determination of Germany to make use of the rivalry between France and the United Kingdom to extract concessions from the United Kingdom and to found a colonial Empire. It was from 1899 to 1902 immersed in the burden of the Boer war, and did not dare to risk giving Germany cause for fresh friction. But these considerations meant little or nothing to the people of the colonies, who merely saw that what they wanted was not attained,

and bitterly resented what they deemed the utter indifference of the United Kingdom to the colonies, and the readiness of British diplomatists to gratify their continental confrères by sacrifice of colonial aspirations.

It is often repeated how Sir John Macdonald condemned utterly the diplomacy of the British representatives at Washington in 1871, and how he regarded them as utterly indifferent to Canadian interests. It is forgotten that the same representatives were allowed to abandon the position for years fiercely maintained by the Imperial Government and to consent to the arbitration of the *Alabama* claims under conditions which rendered an adverse decision to the United Kingdom almost inevitable from the outset. It is also forgotten that Sir J. Macdonald had the power to refuse to secure approval of the treaty from Parliament, in which case the Canadian provisions would have become void, and that after cooler reflection he obtained ratification in 1873, and that, in fact, Canada was a great gainer under the convention. It may be feared that much of Sir J. Macdonald's indignation was stimulated by the reflection that by adopting this attitude he could excuse the treaty if it turned out unhappy, while accepting its benefits if it proved to be acceptable to the Dominion, as facts soon showed it to be. British diplomacy again secured the setting up of a High Commission in 1897 to seek to adjust relations between Canada and the United States, and it was no fault of the British representatives that the United States proved intransigent. Even the most serious cause of friction, the Alaska Boundary issue, was one in which British diplomacy was blameless. It is unhappily the

case that the United States chose three pronounced partisans in lieu of the three impartial jurists of repute whom she was bound under the treaty to appoint as her representatives on the tribunal, but Canada had the opportunity to withdraw the three nominees who had been appointed and to substitute men of equally partisan character. It is unfortunate that the final decision rested on the vote of Lord Alverstone, who gave it in favour of the American contentions, and that in part his decision can hardly be reconciled with judicial discretion. But he was aware of the fiery language used by the President, and of his threat to fix the boundary by his own authority, and he may well have been intimidated into a decision rather than leave a deadlock, when, after all, no great issue was at stake. Moreover, if this episode is set down to the discredit of the United Kingdom, there should be set on the other side the most successful tenure of office by Lord Bryce as Ambassador at Washington, when there were concluded treaties of a great variety of subjects deeply concerning Canada, including the quadripartite convention of 1911, in which Japan and Russia participated, and which did something to preserve the fast-disappearing seal herds and gave Canadian sealers compensation for the losses which they sustained. Nor should it be forgotten that in the anxious years from 1890 to 1894, when the United States was seeking to make the Behring Sea a *mare clausum* and to assert a proprietorial interest in the seal herds because their breeding place was on American territory, the whole force of British diplomacy was exerted to secure redress for the seizure of Canadian vessels, and that the ability of British counsel helped greatly to secure the victory before the

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Arbitral Tribunal which ended for ever the American pretensions.

There is even less to blame, on a sober judgment, in the Imperial record in the case of Australasia. The colonies there desired that the Imperial Government should annex all territory not in the occupation of European Powers within the Pacific, but they declined flatly in 1875 to bear the cost of the administration of the annexation which they desired to see made, and the Imperial Government justly held that it did enough when it took over Fiji and the burden of enforcing the Pacific Islanders Protection Acts of 1872 and 1875. The colonial attitude had, of course, an unhappy result, when, in 1883, German colonial ambitions led to designs being formed by her on New Guinea and other islands in the Pacific. Some errors were made by the Foreign Office, which accepted formal assurances by the German Government as being true, instead of regarding them as a means of preventing British action taking place until too late, but the colonies again were not willing to pay for the administration of the territories they desired, until it was too late to save the whole areas in question. One constitutional issue of great importance arose: the Government of Queensland purported to annex New Guinea, save the Dutch portion, but the annexation was not ratified by the Crown. It was, of course, clear that no Governor had any authority to add territory to the Empire, though such acts can be ratified *ex post facto*, and the disavowal of the annexation was practically inevitable. Ultimately the annexation of 88,000 miles of New Guinea was made effective.

Samoa was next to cause trouble, for the cession of

the British claim to Germany by the treaty of 1889 appeared to Mr. Seddon a shameful surrender of New Zealand interests, and he failed to realise that the settlement was practically extorted from the United Kingdom by the menace of German hostility at a critical moment of the Boer war. Indeed, high credit is due to the diplomacy which extracted from Germany the Northern Solomons and her rights in Tonga and Niue. The New Hebrides remained to become a source of a serious quarrel between the Commonwealth and New Zealand on one side and the Imperial Government on the other. Lord Elgin, without consulting either, hastily concluded arrangements with France in 1906 for a condominium, and the Dominions protested justly, if perhaps with excessive warmth, against the alleged indifference to their interests. Despite various patchwork attempts to improve on this wretched system of government, it remains still operative, to the great disadvantage of the natives. Much of the blame must rest with France, which has shown no desire to afford adequate protection to the unlucky people, while it is amazing that in the long series of concessions made to France by the British Government it has never proved possible to obtain the slight *quid pro quo* of the transfer of the islands to one sole control.

In South Africa complaints of the supineness of the Imperial Government which allowed Germany to take possession of extensive territories are still made, but it is impossible to ignore the fact that the Cape Government, which might have secured South-West Africa, failed to do so because it refused to undertake the cost of administration until it was too late to act. Cecil Rhodes must share the blame for this inaction,

and it is impossible seriously to censure the Imperial Government for its inability to see how the British public could be asked to pay for the control of a territory whose richness in diamonds was then, and long after, wholly unsuspected, and whose Imperial value was negligible. On the other hand, British efforts secured the reduction of the South African Republic to reasonable limits, and prevented Natal suffering loss of access to St. Lucia Bay, nor was it practicable politics to claim that Germany should have no share in the exploitation of East Africa. The failure to secure Delagoa Bay was unfortunate, but it was lost under Marshal Macmahon's arbitral award and not by diplomatic weakness, and in 1890 firm measures against Portugal secured the establishment of Southern Rhodesia.

In these political matters the part played by the British Government was naturally predominant, though free use was made of Dominion advice, and the great issues of the Washington Treaty were entrusted to Sir John Macdonald along with the other British delegates. The doctrine that Canadians should be arbitrators was perfectly acceptable to the British Government in the case of the Alaska Boundary arbitration, and though, unluckily, Lord Alverstone was made one of the three British arbitrators, the other two were Canadian. The precedent was borne in mind by Lord Bryce in considering the treaties with the United States which contemplated arbitral decisions, and definite recognition was given in several ways to the position of the Dominion. In the Arbitration Treaty arranged in 1908 it was provided that, if any issue affecting a Dominion were to be arbitrated,

the consent of the Dominion Government concerned to the formulation of the issue would be requisite, just as was the consent of the Senate to such formulation. Again, in the Pecuniary Claims Treaty of 1911, a similar condition as to Dominion approval of claims affecting the Dominions was duly inserted, and in the treaty of 1914 for the establishment of a Peace Commission, it was provided that, if a matter affecting a Dominion came under its notice, it would be open to the British Government to substitute a Dominion representative for the British member of the Peace Commission.

A much more distinct and important recognition of the position of the Dominions was achieved in the Boundary Waters Treaty of 1909 with the United States. The treaty contained a provision under which "any questions or matters of difference arising between the high contracting parties involving the rights, obligations, or interests of the United States of America, or the Dominion of Canada, either in relation to each other or their respective inhabitants, may be referred to the International Joint Commission by the consent of the two parties, it being understood that on the part of the United States any such action will be by and with the advice of the Senate, and on the part of His Majesty's Government with the consent of the Governor-General in Council".[1] The tribunal in question was that set up to deal with questions arising out of the immediate subject matter of the treaty, the control of the boundary waters, but the additional clause gave the agreement the widest scope which

[1] The treaty so clearly gives Canada control that even on March 15, 1928, the Prime Minister held change unnecessary.

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the two parties might see fit to extend to it. In point of fact the tribunal has been used freely, not so much to decide issues of a general character, but to advise on important projects, mainly those affecting the diversion of boundary waters and schemes of electric development, in which both Canada and the adjacent States of America have the deepest interest. Thus its activities have included investigations as to the pollution of boundary waters, the regulation of the level of the Lake of the Woods, which led to a treaty of 1925, the St. Lawrence power and navigation investigation, and the division of the waters of the St. Mary and Milk Rivers in Montana and Alberta. None of these matters, however, fall under the wider power of the treaty, and its importance lies, therefore, rather in its recognition of the status of Canada than in its actual effects.

III. *Proposals of Neutrality*

Curiously enough, quite early in the history of responsible government, expression was given to the idea that the colonies should, without ceasing to be connected with the United Kingdom by the bond of the Crown, achieve the position of neutrality. The issue was raised in Australia[1] in the period when resentment had been aroused by the withdrawal of the Imperial forces and the apparent harshness with which New Zealand had been treated by the Imperial Government. But the main instigation in the matter came from the Irish patriot, Gavan Duffy, whose views were unquestionably inspired in large measure

[1] Allin, *Political Science Quarterly*, 1922, pp. 415-39.

by his dislike for the United Kingdom. The moment was made auspicious for his efforts by the outbreak of the Franco-German war, which coincided with the absence of any strong Imperial naval force in the waters of Australia, while a French squadron was at hand. As the British Government made it clear that it would take up arms against either belligerent in defence of the neutrality of Belgium, it was felt possible that Australia might be exposed to attack by the French fleet, against which it was without serious protection. At the same time, the insistence on the neutrality of Belgium encouraged the feeling that neutrality was a condition well worthy of achievement, and that, if only it were conceded, the colonies might be freed from trouble on the score of war dangers. Hence Gavan Duffy was able to secure the appointment of a Commission in Victoria which took up these matters and started the idea of colonial neutrality. Stress was laid in its report on the defenceless condition of the colonies and their liability to be involved in war, though they could influence the commencement or continuance of war no more than they could control the movement of the solar system, and though they had no assurance of that aid against an enemy on which integral portions of the United Kingdom could rely. The proposal of a Council of the Empire, whose consent would be requisite to the declaration of the war, was dismissed as out of the region of practical politics as involving too great a surrender of Imperial authority. There remained only one alternative. States under one Crown were not involved in war merely on that account if they were completely independent. The colony had a separate Parliament, Government flag,

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its own naval and military establishment; it appointed its own officers save the Governor, and in the case of the Ionian Islands, which were not automatically involved in British wars, the head of the executive had been so appointed. "The single function of a sovereign State as understood in international law, which the colony does not exercise or possess, is the power of contracting obligations with other States. The want of this power alone distinguishes her position from that of States undoubtedly sovereign. If the Queen were authorised by the Imperial Parliament to concede to the greater colonies the right to make treaties, it is contended that they would fulfil the conditions constituting a sovereign state in as full and perfect a sense as any of the smaller states cited by public jurists to illustrate this rule of limited responsibility." It was further urged that the policy of the Imperial Government was in harmony with the idea of laying aside responsibility for outlying territories, and that it would be no disadvantage to the mother country if the colonies were conceded neutrality, since, as sovereign States, they could assist her in a just war. The Commission evidently did not realise very clearly that they were confusing two ideas. Neutrality belongs to sovereign States, and could become theirs only at the price of severing any save a formal tie with the United Kingdom. Neutralisation of a portion of the territory of a power was conceivable, but that would have denied the colonies the power to aid in any war. Nor was it likely that the foreign Powers would regard with satisfaction a system under which they would be unable to attack and reduce the valuable British colonies if they remained neutral, while these colonies

might at a moment's notice throw aside their neutrality if they saw the enemy hard pressed, and an opportunity of seizing his territories presented itself.

The project fell flat; its author's loyalty was perhaps unfairly suspect, and in any case there was too much common sense in Australia for the proposal to win serious adherents in any numbers. The treaty issue was disposed of by the concession of power to make agreements with other Australasian colonies, and its sequel in the failure of the colonies to make such agreements showed that there had been little substance in the whole movement. Moreover, the ideas of imperial expansion in the Pacific, which soon became marked especially in New Zealand, banished ideas of seeking to stand aloof in neutrality from the movements of politics in the Pacific area. Above all, the colonists resented the presence of French penal settlements, but they were absolutely helpless to resist France, unless they could rely on the power of the British fleet.

The issue thus died away in Australasia, and it was not seriously revived until the condition of affairs in South Africa in 1899 made it clear that a war with the Dutch Republics was inevitable. Then there arose in the minds of some of the members of Mr. Schreiner's Ministry the idea that the Cape might be saved by adopting a neutral attitude from the horrors of a civil war. It was recognised that there would be danger of many of the Cape Dutch rising in support of the Boers, and the device thus presented itself under a plausible aspect. The absurdity of the idea was unflinchingly exposed by Sir Henry de Villiers, whose sympathies to a certain extent were with the Boers,

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but who saw quite clearly that the only duty of a British Ministry in the Cape in time of war, or danger of war, was to prepare to take an active part in the struggle, on pain of being dismissed by the Governor if they did not. Fortunately the Boers removed any doubt as to the duty of the Cape Government, for the Cape was hastily invaded, and some of its territory was claimed for the Orange Free State. It was falsely claimed that in 1910, during the debates of the Naval Bill in Canada, Sir W. Laurier had declared the right of Canada to remain neutral in a British war. But this assertion had no foundation in fact, for Sir W. Laurier merely reiterated that it was for Canada to decide in any British war what active part she would play, a doctrine which has been a commonplace since the beginnings of self-government. Once more the assertion was revised in the *Volksstem* in South Africa in 1911, and General Botha, with his usual good sense, absolutely repudiated the possibility of neutrality in a British war.

IV. *The Progress towards Sovereignty in 1911–14*

The anxious times in Europe between 1904 and 1910 had some effect in exciting interest in the Dominions in the wider aspects of foreign policy which had hitherto been almost entirely neglected by Dominion Governments. The Imperial Government continued, of course, to carry on its policy without reference to the Dominions on any save issues affecting them directly. Thus the Anglo-French *entente* of 1904, with all its implications, was concluded without consulting the Dominions other than Newfoundland, which was in-

formed of the proposed settlement of the long-drawn-out controversy as to the extent of the rights of the French fishermen in that colony. The great compact of 1907, which added Russia to the number of the friends of the United Kingdom, was similarly concluded without Dominion knowledge, and the Hague Conference of 1907, like the first Hague Conference, was conducted without any participation of the Dominions. But out of this Conference rose the issue which specially stirred Dominion feeling, naturally sensitive to anything that affected sea power, and rendered anxious by the reports of the tension in Europe caused by the policy of Austria-Hungary, and the strained relations between France and Germany. The Conference elaborated a project for the establishment of a Court of Appeal in Prize Cases, but the British Government declined to ratify it, unless there were first elaborated a code of prize law to be applied by the tribunal. This task occupied the attention of the London Conference of 1908, whose work, the Declaration of London, excited keen criticism in the United Kingdom. The objections taken to its terms were freely circulated in the Dominions and induced them to fear that there would be much danger of interference with the supply of food-stuffs, largely Dominion produce, to the United Kingdom in case of war. They were perturbed also by the failure to prohibit the sinking of neutral vessels, and the facilities left for the conversion of merchant vessels into ships of war. Hence, the issue was raised at the Imperial Conference of 1911 of the failure to consult the Dominions when the convention was drawn up, and Sir E. Grey explained that the omission was merely in accord with precedent; as the Dominions had had no share in

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the Hague Conference, so they were not invited to the London Conference. It was agreed by the Conference that all was not satisfactory and that "the Dominions shall be afforded an opportunity of consultation when framing the instructions to be given to British delegates at future meetings of the Hague Conference, and that conventions affecting the Dominions provisionally assented to at that Conference shall be circulated among the Dominion Governments for their consideration; and that a similar procedure, when time and opportunity and subject matter permit, shall, as far as possible, be used when preparing instructions for negotiation of other international agreements affecting the Dominions". After recording this resolution the Dominions, save Australia, which abstained, affirmed their approval of the ratification of the Declaration of London. Sir W. Laurier, however, was insistent on negativing the idea that the Dominions desired to be asked to advise on all points of international relations, for giving advice involved responsibility which the Dominions did not desire to assume. But the Dominions all accepted gladly the offer to expound to them the principles underlying Imperial policy which was made by the Foreign Secretary, and his eloquence enabled them to homologate the policy of the renewal of the Japanese alliance, despite the objections to any close connexion with Japan felt both in Australia and Canada. It was also agreed that use should be made of the Committee of Imperial Defence in connexion with discussions on defence as connected with foreign policy, and that Dominion Ministers when in England should be invited to take part in the deliberations of that body when issues affecting Dominion defence were

under consideration. A further project contemplated the creation in each Dominion of a Defence Committee to co-operate with the Committee of Imperial Defence.[1] One interesting suggestion was thrown out to an indifferent audience by Mr. Fisher, the Prime Minister of Australia, when he expressed the view that the Dominions might be put into relation with the Foreign Office if the Prime Minister could not undertake the duty in view of his many other burdens.

The outcome of the Conference was limited, but the point was taken up more earnestly by Mr. Borden when he became Prime Minister of Canada on the defeat of Sir W. Laurier on the issue of reciprocity. He visited England to receive full explanations on the subject of defence, and expressed a desire to take a much fuller share than had been the case in the past in the discussion of foreign policy. He contemplated the possibility of a Minister from the Dominion being present for some months each year in London, when he would confer with the Committee of Imperial Defence. It was made clear by the Imperial Government that the Committee was only an advisory body, and that the final decision lay with the Cabinet and Parliament, but a ready promise was given that every facility for discussions with the Prime Minister and the Foreign and Colonial Secretaries would be afforded to any Dominion Minister who was sent to London for the purpose of consultation. The plan was also offered to the other Dominions by Mr. Harcourt on December 10, 1912, but it elicited singularly little response. Australia suggested instead a special Naval Conference at a time

[1] These resolutions were recalled and reaffirmed by the Imperial Conference of 1926.

when the other Dominions could not attend; the Union thought any regular consultation on general policy otiose so long as special issues were referred to the Union as usual; New Zealand and Newfoundland deemed permanent consultation unnecessary. The truth was that, once they returned to their Dominions, the Prime Ministers were so immersed in arrears of work, and so busy in facing the concrete political difficulties which faced them, that they had no time to think of general foreign affairs, but left them in the hands of the Imperial Government. Mr. Borden was no doubt an exception to this indifference, but the failure of his proposal to grant 35 million dollars to the British Navy, and the many perplexities besetting his Government, delayed any decisive action on the new understanding until just before the war. On the other hand, under the auspices of the Committee of Imperial Defence, the detailed instructions were drawn up which were so valuable at the outbreak of war in co-ordinating the energies of the Dominion Governments and facilitating co-operation with the Imperial Government.

A most important development in Imperial relations was, curiously enough, brought about by nothing more heroic than a Radio-telegraphic Conference in 1912. Many instances had taken place in the past of the Dominions being represented in one way or another at General Conferences, but no issue as to international questions had arisen until 1906, when the question was raised how the delegates to the Postal Conference should be accredited. Ultimately, the device was adopted of giving authority to the colonial representatives from the Secretary of State for the Colonies in the same way as the British representatives were given powers by

the Postmaster-General, and the agreements were treated not as treaties proper, to be formally ratified, but merely as accords which were formally approved. This procedure, however, was held to be inapplicable to the Radio-telegraphic Conference to be held in 1912, but it was desired that there should be distinct representation of the great Dominions in order that they might act as they thought fit, and possess separate voting power. It was, therefore, decided to create a precedent, and to issue full powers to the representatives of the United Kingdom and also to the representatives of each of the four great Dominions. The full powers of the former were expressed in the usual form without limitation of area of authority; those of the latter were confined to the representation of the interests of the Dominion concerned. The decision was momentous as a precedent. For the first time the King had appeared at an International Conference represented, not by a single delegation, but by five separate delegations, each armed with full powers. The unity of the Empire was thus diplomatically divided up, but the innovation hardly raised the slightest attention. Its importance was entirely unappreciated apparently even by the Foreign Office, which was chiefly concerned with solving in a practical manner a rather inconvenient issue.

The precedent thus set was followed in the case of the Conference of 1913–14 on the Safety of Life at Sea, when Canada, Australia, and New Zealand, as maritime Powers of some importance, were formally invited to be represented by their own plenipotentiaries armed with full powers. The procedure adopted was in both cases the same. The full powers were issued on the advice of the Secretary of State for Foreign Affairs, who

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acted on the request of the Colonial Secretary, who again based his request on the desire of the Dominion Government. The chain of responsibility was thus complete, and ratification was effected on the same principle. The King's action was based on the advice of the Imperial Government, which again acted in accordance with Dominion wishes. The way was thus open for a great extension of international recognition of the personality of the Dominions, and the suggestion was made by me that an attempt might be made to obtain separate representation for the Dominions at the Hague Conference, when preparations for that occasion were under consideration in 1914. It was deemed then premature to consider such action unless the initiative came from the Dominions. Very possibly such initiative might long have been delayed, had it not been for the war of 1914–18, which rendered far more rapid than was normal the emergence of the Dominions from their state of languid interest in external affairs.

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DOMINION STATUS IN THE WAR AND AT THE PEACE CONFERENCE

THE imminence of war in Europe was not realised by the Dominions, for the British Government had not communicated to them the anxious reflections induced by the murder of the Archduke Ferdinand. Nor had the Union of South Africa been made aware of the projected treaty with Germany for the eventual partition of the Portuguese territories in Africa, which would have shown how far-reaching were German designs of territorial acquisitions in Africa, and have impressed on the Union the delicacy of her position, and the importance of supporting British policy. Hoping against hope for the maintenance of peace, the Imperial Government feared to warn the Dominion lest their intimations should become public property and perhaps hasten the event they were so anxious to avert. In these circumstances the response of the Dominions was amazingly unanimous and effective, partly, no doubt, through the educational effect of the visits made by individual Ministers to the United Kingdom in 1913, and the knowledge then confidentially acquired, which prepared the Governments in some measure for the outbreak of war. The extent of their participation has

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already been indicated; its financial effect was to impose enormous burdens of debt on young communities, and the whole issue of Imperial relations was earnestly canvassed long before peace was in sight.

The Imperial Government naturally showed little anxiety to take up constitutional issues in the war period. It indeed consulted the other Dominions, on the motion of Australia, as to the possibility of holding a Conference, but the proposal was unacceptable and, instead, an assurance was given of personal consultation before the terms of peace were arranged. Doubtless the Ministry still believed that this consummation was within sight at a reasonable date, but the anticipation was utterly disappointed, and, though no Conference met, personal touch was secured in some measure by Sir R. Borden's visit to London in 1915, when he was made the recipient of the honour of an invitation to consult the Cabinet, and by similar visits of Mr. Hughes, and of Sir J. Ward and Mr. Massey, the heads of the Coalition Government of New Zealand, in 1916. But the prolongation of hostilities demanded something more formal and effective, and Mr. Lloyd George's assumption of office at the close of 1916 was followed by the summoning of the first Imperial War Cabinet.[1]

The nature of this body was interesting. It was composed of the members of the British War Cabinet, that is, the Ministers charged with the oversight of war operations, combined with the oversea representatives, for deliberation about the war, and for discussion of the larger issues of Imperial policy connected with the war, while minor issues and non-war questions were discussed at the Imperial War Conference by the oversea

[1] Keith, *War Government of the British Dominions*, chap. iii.

representatives and British Ministers under the presidency of the Colonial Secretary, as opposed to the Prime Minister. The same procedure was followed in 1918, and the War Cabinet insensibly passed over into the British Peace Conference Delegation at Paris. The name Cabinet was not fortunate, and its explanation as a Cabinet of Governments, coined by Sir R. Borden, hardly helps to elucidate the meaning. The salient characteristics of a true Cabinet were all missing. The Prime Minister sat as a mere *primus inter pares* among colleagues who were independent of him; there was no joint responsibility, for each Government owed responsibility solely to its own Parliament; there was no possibility of majority voting, for no Government could bind another, and no Dominion Government could undertake, in any matter of importance, to bind its Parliament; there was no executive authority to be exercised under the directions of the Cabinet, for the various executives in the Empire were responsible each to a single Cabinet, not to this War Cabinet of Governments. There was, of course, nominal equality in the Cabinet; each Government could freely discuss and express its opinion, but it would be idle to suppose that the Dominions could share to anything like the same extent as did the United Kingdon in determining either war or peace policy. The sacrifices and resources of the United Kingdom were proportionately incomparably greater than those of the Dominions, and it would have been absurd for the Dominions to demand either action or cessation of action, when they were not ultimately the Power chiefly concerned. On the other hand, the Dominions were thus enabled to express with all the weight of their united strength and co-operation

their views on the wisest use to be made of the joint military and naval efforts which were being made. Moreover, the fact that they had placed their forces, with much wisdom and generosity, under the Imperial control, rendered any policy agreed upon in the War Cabinet easy to carry out. The Imperial Government could then at once issue orders, and, though it was responsible for such orders, it had the moral support of the War Cabinet. But the whole arrangement was obviously temporary, the outcome of a special need, and the immediate disappearance of the institution after the Peace Conference was at once inevitable and salutary.

Despite the efforts to concentrate all the strength of the Empire for the needs of the war, remarkable care was taken not to violate the autonomy of the Dominions. Any idea of putting pressure on the Dominions to send forces or to adopt conscription was ruled out, and, when compulsory service was instituted, the Act exempted persons normally resident in the Dominions, though temporarily in the United Kingdom. So also in the conventions made with allied Powers regarding the liability to compulsory service of persons resident in the territory of either Power, exemption was claimed for residents in Dominions which, like Australia and the Union, had rejected compulsory service for oversea defence. On the other hand, the normal war prerogatives of the Crown were freely used, as, for instance, in the establishment of Prize Courts in the Dominions, in the fixing of days of grace, in the definition of contraband, in the reprisals Orders in Council, and so forth. But though the Royal Proclamations forbidding trading with the enemy were appli-

cable to the Dominions as part of the ordinary prerogative, it was not proposed to extend to the Dominions the Imperial Acts dealing with trading with the enemy and extending the scope of that operation, and the Dominions were left free to deal with these issues under their own authority.

The Peace Conference raised at once the issue of the status of the Dominions in an acute form. The Imperial War Cabinet had acted as a unit in a sense, but the Dominions were by no means content that a single delegation should deal with the issues of peace. To accept this was repugnant to Sir R. Borden and to Mr. Hughes, whose insistence overruled his doubting Cabinet and embittered his relations with Mr. Watt, as well as to General Smuts; Mr. Massey, on the other hand, was much less enthusiastic for a distinct representation for New Zealand, and in this he was supported by the weight of opinion in the Dominion. Mr. Hughes' attitude was distinctly inspired by his indignation that the Imperial Government, despite his presence in England, accepted, without reference to him, for the whole Empire the fourteen points laid down by President Wilson as the basis of peace negotiations. This action has never been sufficiently elucidated; apparently it was feared that Mr. Hughes would raise inconvenient points as to the issue of reparations, which might delay a favourable response to the President's *démarche*. But it undoubtedly strengthened the Prime Minister's feeling that the Dominions must be assured a more effective place in the peace negotiations.

The effective pressure was doubtless that of Sir R. Borden, who, on October 29,[1] pressed the view of dis-

[1] *Canadian Constitutional Studies*, pp. 116-18.

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tinct representation on the Imperial Government, and whose wish was confirmed by the Dominion Cabinet on December 4, when it telegraphed that "in view of the war efforts of the Dominion, the other nations entitled to representation at the Conference should recognise the unique character of the British Commonwealth as composed of a group of free nations under one Sovereign, and that provision should be made for the special representation of these nations at the Conference, even though it might be necessary that, in any final decision reached, they should speak with one voice". The Imperial War Cabinet could not resist the argument based on the enormous extent of the services of the Dominions as compared with those of the minor Powers who would be represented at the Conference, and its persistence ultimately wore down the objections of the Supreme War Council, the foreign members of which were, as usual, slow to realise the peculiar nature of the status of the self-governing Dominions. As finally adjusted, the rules of the Conference issued on January 15, 1919, provided for a distinction between Powers with general interests, that is, the United States, the British Empire, France, Italy, and Japan, whose delegations of five members each, the Council of Twenty-five, were to attend all sessions and commissions, and the Powers with special interests, including the Dominions and India, which were to attend sessions at which questions concerning them were discussed. The number of representatives thus allowed to the Dominions gave the greater Dominions two apiece, with one for New Zealand. But what was more important was the fact that the Dominion representatives formed also part of the British Empire Delegation, and in that

capacity were qualified to represent the voice of the British Empire, as one of the Powers with general interests. Thus, unquestionably, they obtained far more power of having their wishes expressed than did the minor Powers which were co-belligerents in the war.

In actual operation the work of the Conference fell largely into the hands of the President of the United States and the Prime Ministers of the United Kingdom, France, and Italy, the Council of Four, but the policy of Mr. Lloyd George was formed only after consultation with the Empire Delegation, including the Dominion representatives. Individual expression of Dominion views was possible at Plenary Sessions of the Conference, though these were mainly of formal interest. Thus, Mr. Hughes protested, on February 14, against the adoption of the mandatory system as the mode of disposing of the German colonies, and Sir R. Borden, on April 11, secured the full recognition of the position of the Dominions on the Labour Organisation created by the peace treaties. The Dominion Ministers also served on International Commissions appointed by the Plenary Conference, and on committees selected by the Council of Ten.[1] In one point, of purely theoretic importance, they were in a sense in a different position from the minor States, for, if voting were to take place, it was agreed that the Empire must vote as a unit, a matter of utterly unimportant character, as the Conference was not governed by numerical majorities.

The status thus achieved was preserved in the formal mode of signature of the treaties of peace, and in their ratification. Sir R. Borden, on March 12, pre-

[1] Two representatives each of the five principal Powers, but usually reduced to the Council of Four.

sented a memorandum in which it was demanded that the Dominions should be enabled to become signatories and parties to the treaties, in lieu of merely being accorded the right to adhere. Moreover, signature would obviate any appearance of lack of unity in acceptance, and it could be effected simply, merely by giving as the plenipotentiaries the representatives of the United Kingdom, Canada, etc., in order, stating for which part of the Empire each signed. The actual procedure adopted differed slightly from that suggested, for the United Kingdom representatives simply signed for the King without specification, while specification was inserted for the Dominions. Sir R. Borden has criticised[1] this deviation as erroneous, but it is clear that it was a correct replica of the procedure which he himself had secured for the Conference. At it the Dominions served in a double capacity; they had separate representation, but they also served as members of the British Empire delegation, and the complex signature of the treaty expressed the same idea.

Sir R. Borden insisted also that the ordinary procedure as to ratification should be observed, and that the Dominion Parliament and Government should be formally consulted before ratifications were expressed. On this point some divergence of view arose between Lord Milner and the Dominion Ministers, for the former was anxious to avoid delay and urged the acceleration of ratification, suggesting that in view of the signature of the Dominion representatives there need be no delay for formal approval by the Dominion Parliaments. The views, however, of Lord Milner were countered by Sir R. Borden and his Government, and

[1] *Canada in the Commonwealth*, p. 103.

the Dominions were accordingly given the necessary time to ratify the treaties approved by Parliament prior to the ratification being deposited for the whole of the Empire. The procedure was, of course, without parallel. Dominion Ministers had often signed treaties before; they had even signed treaties in 1912 and 1914, as noted above, as representing distinct parts of the Empire; but they had never signed a great international instrument establishing peace and resettling Europe. The mode of signature was a clear indication to the whole of the world that the Dominions had achieved a new and distinctive status as the result of their war services to Europe and the world.

The extent of the influence of the Dominions on the actual settlement of the peace terms may be disputed. Mr. Bonar Law, on May 16, 1919, asserted that, just as in the Imperial War Cabinet the Dominion representatives took, in every respect, an equal part in all that concerned the conduct of the war, so in Paris in the last few months they had as members of the British Empire Delegation taken a part as great as that of any member, except perhaps the Prime Minister, in moulding the treaty of peace. In form, this was supported by the care taken to secure the presence of Dominion representatives on various important bodies; thus General Smuts served upon and contributed largely towards the work of the Commission on the League of Nations.[1] Mr. Hughes dealt with reparations, though he was far from satisfied with the limitations upon that topic imposed by the acceptance of the President's Fourteen Points. Mr. Massey aided the Commission on Offences against the Laws of War, but the labours of

[1] *History of the Peace Conference*, vi. 438, 439.

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that body proved to be among the most fruitless of all the efforts made at Versailles. Mr. Sifton's experience as to Canadian railways and waterways made him a suitable exponent of British views on the Commission on the Control of Ports, Waterways, and Railways. Sir R. Borden again served on the Committee appointed by the Council of Ten to investigate the problems of Greece; General Botha similarly investigated, without much satisfaction, the questions affecting Poland, and Sir Joseph Cook the affairs of Czechoslovakia. These commissions and committees were rigorously limited in size, the Principal Allied and Associated Powers having only two members to serve on each, and the position accorded to the Dominion representatives was certainly adequate in proportion to the services of the Dominions. Similarly, the pre-eminence of Canada was marked by the compliment paid to Sir R. Borden of appointing him to act as head of the British Delegation in the absence of the British Prime Minister. Nor is there any doubt that their views on all topics received the full consideration of the British Prime Minister, into whose hands the real control of the negotiations, as far as the Empire was concerned, passed by March, when the system of settling important issues in the Council of Four became regular.

On the other hand, it can hardly be said that materially the Dominions achieved anything like so much as they had hoped. General Smuts was, in a sense, a parent of the mandates system, but he had not contemplated that this instrument would be forced on South Africa as the condition of the retention in her hands of German South-West Africa, even though it was agreed that the territory might be treated in many respects

as an integral part of Union territory. Still less was this position acceptable to Australia, which much resented the British readiness to accept in this matter the desires of the President of the United States. None the less, Mr. Hughes was successful in achieving two of his points. He was determined to shut out the possibility of Japanese immigration, even though it had not been forbidden under the German régime in the territories to the north of Australia, which it was Mr. Hughes' determination to acquire. He was also determined to secure the right to adopt a preferential tariff system, and in these issues his views prevailed. Moreover, Australian sentiment was met by the decision of the Conference not to accept the arguments of Japan in favour of inserting in the League Covenant a clause insisting that all States, members of the League, should afford, in law and in practice, equal treatment to all nationals of other members of the League, without discrimination on score of race. It would, of course, have been very difficult for the British Government to refuse agreement to such a proposal, but the objections of the Dominions determined British policy, when taken in conjunction with the attitude of the United States, in which anti-Japanese sentiment was steadily increasing. But Australia, though successful in obtaining the German islands south of the equator, pleaded in vain for the grant to her of those north. The rights of Japan, though denied by Mr. Hughes, were really incontrovertible, and eventually they were handed over to Japan, though only under mandate so that there could be no possibility of their being fortified or made bases of operations against the Commonwealth. Mr. Hughes' denunciations of the British Government for

lack of appreciation of the Australian claim seem hardly justified, and it would have been absurd to expect other States to sympathise with the Australian claim. The allocation of Samoa to New Zealand, though it might have seemed in accord with the history of that Dominion's interest in the islands and her former desire to acquire sovereignty over them, was not warmly received by Mr. Massey or Sir J. Ward. They desired, of course, that they should be secured for the Empire, but they would have preferred, especially as the islands were to be transferred subject to the mandatory system, that the responsibility for administration should have fallen to the United Kingdom. The existence of rivalries even in the Empire was seen in regard to the phosphate deposits of Nauru, and the issue was only solved by a tripartite agreement between the two Dominions and the United Kingdom. A just source of dissatisfaction was afforded to both these Dominions by the failure of the British Government to induce France to abandon her hold on the New Hebrides, which were left to suffer under the ineffective condominium of 1906, while an equally definite negative was returned to the suggestion that St. Pierre and Miquelon islands, which serve mainly to encourage smuggling, might be handed over to Newfoundland.

Mr. Hughes had also to face disappointment on the score of reparations. Australia had suffered severely during the war in interruption to her trade, and her war expenditure, put at £364,000,000, reflected both the magnitude of her efforts and the costliness of paying soldiers at Australian as opposed to British rates, while £100,000,000 was set down as the capitalised cost of pensions, repatriation, damage, and loss of property to

civilians, etc. On the other hand, General Smuts represented a country whose costs had been comparatively slight, as much of the burden of the European forces had been defrayed by the Imperial Exchequer, and his views on reparations were accordingly distinctly merciful. The issue was rendered obscure by the vagueness of the President's demand for the restoration of invaded territories, to which the allied powers had added the understanding that compensation was to be made by Germany for all damage done to the civilian population of the allies and their property by the aggression of Germany by land, by sea, and by the air. It turned out, however, that the American view of these conditions added to the obligations of Germany the duty of making reparation for all her illegal as opposed to merely cruel, unjust, or immoral acts. Thus Germany must pay for her breach of law in invading Belgium, in sinking merchant ships, in deporting civilians, and in attacking undefended towns. Fortunately, from the allied point of view, General Smuts, who agreed in limiting the British claims, saw his way to claim for the Empire the refund of pensions to insured soldiers, their wives, and families, and allowances during separation made to wives and families.[1] But even thus the principles adopted were unsatisfactory both to New Zealand and the Commonwealth. General Smuts, on the other hand, held the reparation burden excessive in amount, and, with General Botha, deprecated the probability of further occupation of German territory, and regarded the settlement of the eastern frontier as thoroughly unsound. Indeed, it seems clear that it was with much reluctance that these two statesmen con-

[1] Keith, *History of the Peace Conference*, vi. 353-7.

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sented to accept the treaty as a whole despite its serious defects. General Botha again wisely urged that penalties for violation of the laws of war should be limited to a chosen few among the many offenders, a piece of advice which was not acceptable to Mr. Hughes and which, unhappily, was not adopted by the allies.

There was, however, agreement among the Dominions in insisting that they would not accept the proposal that no one State, including its Dominions, could have more than one representative on the Governing Body of the International Labour Office under the Treaty of Peace, and the pressure of their objections ultimately carried the day, the only rule laid down being that the eight States of chief industrial importance, which were entitled to representation on the Governing Body, should not take part in the election of the remaining four Governmental representatives.

Though they had taken so prominent a part in the negotiation of peace, the Dominions were not prepared to undertake any burden which they could avoid. When it was necessary to reassure France and secure her assent to the treaty with Germany by promising her aid in the event of German failure to observe the conditions affecting the Rhineland, not even the concurrence of the United States was sufficient to induce acceptance of joint responsibility with the United Kingdom, and the treaty with France promising aid, conditionally on the acceptance of a similar obligation by the United States, expressly exempted the Dominions unless their Parliaments chose to accept the obligation. Mr. Hughes, indeed, induced his Parliament to agree, but Canada held back, and the failure of the United States to ratify precluded the possibility of British action.

PART IV

THE EXTENT AND LIMITS OF EXTERNAL SOVEREIGNTY

CHAPTER XVII

THE DOMINIONS AND THE LEAGUE OF NATIONS

I. *The Autonomy of the Dominions within the League*

THE status gained by the Dominions in the war and the Peace Conference was rendered permanent by their insistence on their inclusion as distinct members of the League of Nations. In the first draft of the Covenant the Dominions were not secured a distinct place, and for a considerable period the view was widely held both in British and foreign circles that such a distinct representation was not desirable. It was thought to be likely to impair Imperial unity, on the one hand, while foreign opinion deprecated the increasing of the voting power of any member of the League. Nothing but the most persistent eloquence of the Dominion Prime Ministers, supported by the British Government after it had become aware of the strength of the feeling of Sir R. Borden, Mr. Hughes, and General Smuts, prevailed on the great foreign States to concede the demand. It was impossible to convince foreign opinion that the Dominions were really autonomous, and indeed the doubt persisted for years after there had been seen the spectacle of the Dominions freely disagreeing with the United Kingdom at meetings of the Assembly.

The decision, however, was not intended to interfere with the principle that the Empire remained a unit, despite the distinct personality of the Dominions, and effect was given to this view by the mode in which the position of the Dominions was indicated, as well as by the fact that the treaty itself, in which the Covenant is embodied, treats the British Empire alone as a high contracting party and subsumes the Dominions under the Empire. So in the list of original members of the League the order runs: British Empire with Canada, Australia, South Africa, New Zealand, India, placed below that style, and the representation by a member on the League Council, which is accorded permanently, is representation of the British Empire. There is no doubt whatever of the intention or effect of this procedure. It reasserts the doctrine that there is unity amid multiplicity, and that the Dominions have the right to expect the British Empire representative to express their views, unless they themselves happen to be directly represented on the Council. The issue was at once raised whether such representation was possible despite the existence of a British Empire representative, and on May 6, 1919, M. Clemenceau, President Wilson, and Mr. Lloyd George gave Sir R. Borden a formal assurance that membership of the Council was open to the British Dominions. It is true that at that time, with the restricted size of the Council, the probability of a Dominion receiving a place seemed slight, but the principle was obviously sound, for any other interpretation would have destroyed the real equality of the Dominions with other members of the League.

The doctrine of equality, however, was made subject to one slight modification, which applies also to

the position of the Dominions and the British Empire in the League Assembly. Mr. Rowell, in the Canadian House of Commons, on March 11, 1920, in replying to the attacks made on the Covenant in the United States on the score of the separate voting power accorded to the Dominions, explained that this onslaught rested on a false impression. It had been agreed, he stated, between the United Kingdom and the Dominions that if a case arose of a dispute between a Dominion and a foreign country, and the issue, not being suitable for arbitration or judicial determination, were referred under Article 15 of the League Covenant to the Assembly for investigation and report, then, in the voting on the issue, no other part of the Empire, as being an interested party, could vote. The same rule, of course, applies to the Council, though membership of that body by a Dominion was then deemed remote. The restriction cannot seriously be questioned as a matter of fair play, for the common allegiance owed by the Dominions and the United Kingdom really prevents it being possible that any one part of the Empire should be indifferent to the interests of another part, by which it may be very closely, if not directly, affected. It must, however, be noted that in March 1929 the British Government suggested to the International Court that its statute should be altered so as to ensure that, if a Dominion were engaged in a case before it, it would be legitimate for the Dominion to have on the Court its own national judge in addition to the judge representing the British Empire or the United Kingdom. This claim rests on the view that the Dominions possess a degree of distinct personality which is difficult to reconcile with facts, and especially with the measure of

dependence of the Dominions on the United Kingdom which, as we have seen, still exists at the present day.

It had hardly been expected that the doctrine of equality as regards election to the League would be made effective at an early date. But the changes in the constitution of the Council, under which it was considerably enlarged, strengthened the justice of the desire of the Dominions to be represented, and at the Assembly of 1926 the Minister for External Affairs of the Irish Free State, apparently on his own initiative, put forward the Free State as a candidate for election, but the proposal was not rewarded by success. The British representative had not been informed in time of the intention of the Free State to make any movement in favour of the suggestion, and in any case it was generally felt that, if the Dominions were to obtain a seat, it was right and proper that the step should be taken after full consultation among the parts of the Empire, and that the first occupant must be the premier Dominion, Canada. Sir George Foster, the principal delegate for that Dominion, voiced this point of view on September 15, 1926, the day before the voting which negatived the Irish claim, when he said: "We consider that we have equal rights to representation on the Council and otherwise with every one of the fifty-six members of the League of Nations, and we do not propose to waive that right." At the Assembly of 1927, Canada, without previous discussion in the country or in Parliament, appeared to seek election both as a member of the British Empire and as a representative of America, which had been weakened in the League by the disappearance of Brazil from active membership. Her request for election was perhaps promoted

by the insistence of the Canadian delegate to the Assembly on September 12 on the interest taken by Canada in the issue of minorities, and the fact that Canada regarded arbitration and the compulsory clause of the statute of the International Court more favourably than did the United Kingdom, and her election was secured by 26 votes being recorded for her, including those of the rest of the Empire, the quota necessary being 25. Mr. Dandurand redeemed his assurances of 1927 by bringing the issue of minorities into prominence at the March meeting of the Council in 1929. This sudden incursion of Canada into world politics was rather unexpected; it was apparently desired specially by the French Canadian members of the Cabinet, as suggested by the prominent part played by Mr. Dandurand, a French Canadian, at the Assembly, and his election to serve on the Council in 1929. It was, however, not criticised severely in the Dominion, for it was recognised that the action was a logical sequence of the decision to become a member of the League. What is probable is that the candidature might have been deferred for some time but for the initiative taken by the Irish Free State in pursuance of its determination to lead the way in the development of Dominion sovereignty, external as well as internal.

Canada, however, had already played a very marked part in the construction and interpretation of the League Covenant, though the fact was not at once made known. When the Canadian Government explained in the Dominion House of Commons the terms of the treaty of peace with Germany and the League Covenant embodied in it, no hint was given that a very

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valiant attack had been made during the making of the latter by Sir R. Borden.[1] His aim was directed against Article 10, under which "the members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the League. In the case of any such aggression, or in case of any threat or danger of such aggression, the Council shall advise upon the means by which this obligation shall be fulfilled." Sir Robert Borden pointed out that this meant that it was to be assumed that all existing territorial delimitations were just and expedient, that they would continue indefinitely to be just and expedient, and that the signatories should be responsible therefor. Any such declaration would involve a most careful survey and determination of all territorial issues, and such action was impossible; nor in any case was it clear that there might not develop a situation in which, under the proposed Article, it would be impossible to do justice to national aspirations. The Covenant contemplated the possibility of a war in which other members of the League were not required to intervene between the two members at war. If in such a war one member with the assent of the population occupied a part of the territory of the other, what would be the position of the other members who might sympathise with the State which recovered its lost territory, if that had been unfairly taken from it? Mr. Doherty, supporting the same view, argued that the guarantee ought to be confined to the great States, and that the smaller and weaker Powers should not be required to guarantee a decision which they had not really helped to make.

[1] Corbett and Smith, *Canada and World Politics*, p. 127.

Canada would very possibly be thus burdened with an obligation which would be extremely onerous to her, while the guarantee given to the Dominion was not of importance. If by her own resources and those of the United Kingdom and the United States she could not defend herself, it was improbable that the aid of the other members of the League would be of importance to her. Canada, too, would certainly resent an Article which imposed on her a direct and absolute obligation clearly binding her to military action.

These views of Canada were not ruled convincing by the great Powers, which realised that the bane of European life had been the lack of security, and which therefore attached the utmost importance to creating, if at all possible, a feeling of safety in the minds of the peoples of Europe. Mr. Doherty, however, by the time of his return to Canada had reconsidered the position of that Dominion, and was prepared to meet the challenge of Mr. Fielding that the acceptance of the treaty of peace should be accompanied by a declaration that "in giving this approval this house in no way assents to any impairment of the existing autonomous authority of the Dominion, but declares that the question of what part, if any, the forces of Canada shall take in any war, actual or threatened, is one to be determined at all times as occasion may require by the people of Canada through their representatives in Canada". Mr. Doherty was able to satisfy his audience that the Covenant already safeguarded the influence of the Canadian Parliament and its final decision. Article 10 gave the Council of the League a power to advise what action Canada should take. In consequence of Article 5 of the Covenant a representative of Canada must be

summoned to sit on the League at the discussion of any matter specially affecting any member of the League which was not represented on the Council, and under Article 4 the voting in the Council must be unanimous to have effect, so that the representative of the Dominion could veto any proposal which Canada would not accept. On the other hand, the proposed statement of Mr. Fielding would mean in effect that Canada rejected the treaty of peace and desired to withdraw from co-operation with the rest of the Empire. This rather finespun reasoning had at least the merit of tiding over a difficult situation.

The Canadian Government, evidently dissatisfied with its own exposition, which, pressed to a logical conclusion, meant that Article 10 was waste paper and, what was worse, a snare and a delusion as affording a false sense of security, proposed to the Assembly of 1920 the deletion of the Article. This proposal was remitted to the Council, and was considered by a special committee and a commission of jurists, after which it was discussed at the Assembly of 1921. The discussion then proved that the legal and political arguments for and against the clause were very complex and indecisive, and the matter was adjourned for further consideration in 1922. Canada then, finding that there was no chance of securing the withdrawal of the provision, suggested its amendment by adding to it the following qualifications: (1) the addition at the end of Article 10 of the words "taking into account the political and geographical circumstances of each State"; (2) the addition of a new paragraph as follows: "The opinion given by the Council in such cases shall be regarded as a matter of the highest importance and

shall be taken into consideration by all the members of the League, who shall use their utmost endeavours to conform to the conclusions of the Council; but no member shall be under the obligation to engage in any act of war without the consent of its Parliament, legislature, or other representative body." This proposed amendment was postponed for further consideration, and the opinions of the States invited. Only Austria, Bulgaria, Hungary, and Uruguay accepted the suggestion without cavil; the other twenty-one States which replied before September 1923 made certain reserves, and it was also suggested that the matter must be held over until decisions had been reached on the question of the treaty of mutual guarantee then under consideration. On the basis, however, of the replies, the First Committee of the Fourth Assembly drew up an interpretative resolution to cover the Canadian standpoint. It held that the effect of this resolution would not be to alter the meaning of the Article but would merely clarify it. It ran: "It is in conformity with the spirit of Article 10 that, in the event of the Council considering it to be its duty to recommend the application of military measures in consequence of an aggression or danger or threat of an aggression, the Council shall be bound to take account more particularly of the geographical situation and of the special conditions of each State. It is for the constitutional authorities of each member to decide in reference to the obligation of preserving the independence and the integrity of the territory of members, in what degree the member is bound to assure the execution of this obligation by employment of its military forces. The recommendation made by the Council shall be regarded as being of the

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highest importance, and shall be taken into consideration by all the members of the League with the desire to execute their engagements in good faith."

The interpretation, it is clear, watered down the obligation of the Article to something negligible, and it is not surprising that twenty-two of the States present at the Assembly refused to vote. They were reluctant to disoblige Canada, but they felt that they could not homologate a version which emasculated the Article. Persia, however, went so far as to negative the interpretation, which therefore failed of acceptance as a binding declaration of meaning, for which purpose a unanimous vote is requisite. The issue was then dropped by Canada, which appeared to find in the Protocol of 1924 for the Pacific Settlement of International Disputes a possibility of a settlement which would render the interpretation of Article 10 unnecessary. But the attitude taken by Mr. Dandurand at the Assembly was not that finally adopted by the Canadian Government, which came round to the view that the Protocol itself might involve it in greater liability than existed under the terms of the Article, especially in view of the attenuated meaning apparently attached to it by the greater Powers in the League.

Confirmation of the narrow meaning of the Article may be deduced from the fact that the Irish Free State, when admitted, had in its Constitution a clause expressly providing that active participation in any war can only be authorised, except in the case of invasion, by the Parliament. As the Constitution of the State was formally presented to the League for examination in connexion with its admission, it must be taken that the League was satisfied that the inclusion of this

provision in the Constitution was perfectly compatible with the carrying out of the obligations imposed on the members by Article 10. On the other hand, it may be doubted whether the ingenious reasoning of Mr. Doherty as to the combined effect of Articles 4 and 5, in giving any member a negative voice in the decision to be taken by the Council as to the measures which it should adopt to implement its obligation under that Article, has the assent of the Council of the League, for the interpretation suggested clearly is based on the general principle of the Article, and does not contemplate anything so artificial as the Canadian interpretation suggests.

The independent attitude of Canada as regards Article 10 was, of course, merely in harmony with the general position adopted from the first by the Dominions as regards their participation in the work of the League. This note of individualism was struck by Sir R. Borden at the Peace Conference when, before the second Plenary Session, he protested, as representing Canada, against the decision as to the amount of representation on Commissions established by the Conference which was to be allocated to the minor Powers, an attitude also adopted by M. Hymans. This tradition of independence was immediately followed up at the First Assembly. It might have been expected that, while the distinct membership of the Dominions was fully recognised, yet some attempt would be made to present in major issues a united front at the Assembly, and that for this purpose the representatives of the Dominions and the United Kingdom would have met in London to take counsel with one another.[1] It had been the case

[1] Keith, *War Government of the British Dominions*, pp. 176, 177.

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that at the Peace Conference, despite the separate representation of the Dominions, the essential care of the interests of the Dominions had rested with the British Empire delegation as a whole, and the fact that the British Empire, and not merely the United Kingdom with its dependencies, was a member of the League prompted the view that the unity in diversity which marked the Peace Conference might be continued in the Assembly. But there was the vital difference that it had been admitted at the Conference that, if there were to be voting, the Empire should vote as a whole, and no such restriction normally existed, or could exist, under the League Constitution. Moreover, it was felt in Canada that any policy of prior discussion with the United Kingdom might tie the hands of the Dominion and diminish its status. Foreign States had consented with some hesitation to the admission of the Dominions as distinct members of the League, on the strength of assurances that they were autonomous, and they would be little likely to accept this assurance as valid if they found at the very first Assembly the Dominions acting in concert with the United Kingdom. It appears, however, from Sir R. Borden's later utterances,[1] that he for one saw the wisdom of preliminary investigation by the Governments of the Empire of important matters, but his resignation before the first Assembly left the decision to others, and it was in favour of a definitive assertion of autonomy.

The representatives of the Dominions, therefore, not merely attended the Assembly under the sole authority of their own Governments, without any intervention by the Imperial Government or powers from the King

[1] Speech, August 17, 1925, *Canadian Bar Review*, iii. 519.

in his Imperial capacity, but voiced opinions which they had not discussed with their colleagues representing the Empire. There is no doubt of the effect produced on the representatives of foreign States, who suddenly realised the extent of Dominion autonomy. Although for fifty years the Dominions had in fact managed their domestic affairs at their own pleasure, it was treated by many foreign delegates as a proof of the imminent dissolution of the Empire that Mr. Rowell should asseverate this fact in his speech of December 8. But he caused even greater emotion by insisting that the League had nothing to do with such questions as the due distribution of raw materials among the powers of the world. Domestic issues were entirely beyond the scope of the League in the view of Canada no less than in that of the United States, and the true function of the League was to devote itself to its essential task of preventing war. The League was not a body with undoubted authority to deal with any topic it liked; even under Article 23 of the Covenant, its duty to secure freedom of communication and transit, and equitable treatment for the commerce of all members of the League, was subject to the existence or the conclusion of international conventions dealing with the topics, and in the absence of such a convention the League could take no steps. The other Dominions and India naturally energetically supported this position, contrary to the attitude of the British member of the Council, who had on that body given his approval to the project that an enquiry should be held to investigate the issue of the distribution of raw materials. It must, of course, be admitted that against the narrow view taken by Mr. Rowell might be set the considera-

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tion that many wars have their roots in commercial causes and that a mere enquiry could not violate any rights of the members of the League. Mr. Rowell again protested against the idea that the League should accept financial responsibility for certain technical organisations which it was proposed to set up to deal with economic and financial questions, and with communications and transit, and demanded that these organisations should form the subject of separate conventions among such States as desired to afford them support, and that their cost should be defrayed by the contracting States and not by the League. The issue of cost which thus first emerged has been one on which divergences of view have since occurred between the Dominions, India, and the United Kingdom; thus objections raised by India in 1927 regarding the cost of the Labour Organisation of the League were not pressed in 1928, but in that year the British Government took strong exception to the régime of extravagance which prevails.

In a yet more vital issue the independence of the Dominions at once asserted itself. The States of Albania and Armenia presented applications for admission, and Canada and South Africa championed the cause of Albania. In the Commission which examined the applications the views of France and of the British Empire were against admission, on the score that it was desirable to wait until the international status of the territory had been further cleared up, and Canada and South Africa were overruled. But in the Assembly as a whole they secured their point, having succeeded in rallying the support of the lesser States, and the British and French objections were not pressed. As

regards Armenia, Canada stood alone among the Dominions in advocating admission. Lord Robert Cecil admitted that Armenia did not comply with the requisites of membership laid down in Article 1 of the Covenant; she was not fully self-governing, nor could she give effective guarantees of respecting her international obligations. Nor again could the members of the League honestly pledge themselves to guarantee her political independence and territory, the existence of both of which was in dispute. On the other hand, Lord Robert Cecil pressed for the imposition on new States entering the League of obligations respecting the treatment of minorities similar to those exacted from the new States created or extended under the treaties of peace. Mr. Rowell deprecated the addition of a new condition to admission to the League, and reminded the Assembly that a country like Canada did not view with any favour the creation of privileged minorities encouraged to maintain their identity in lieu of being merged in a new Canadian nationality. The proposal accordingly suffered amendment and limitation before it was accepted, and even then Canada withheld her vote.

The assertion of individuality thus carried out at the first Assembly was naturally followed by its maintenance at subsequent meetings, though perhaps without the stridency necessitated by the initial determination to impress on the foreign States of the League that the Dominions had a real sovereign authority of their own. Australia, which was not specially aggressive at the first Assembly, refrained from voting for the admission of Austria to the League, on the simple ground that as the question of a German application for the return to her of some of her former territory

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under mandate had been mooted, Australia could not actively support the candidature for the League of a State likely to act in the interests of Germany. At the Assembly of 1922, Sir Joseph Cook, at the request of Mr. Hughes, supported the proposal of Dr. Nansen that the League should seek to intervene in the conflict with Turkey; his attitude was in strong opposition to that of the British Empire representative and that of Lord Robert Cecil, delegate for South Africa. At the Assembly of 1924 the Dominion representatives were extremely unwilling to accept the British attitude in favour of the Protocol for the Pacific Settlement of International Disputes, and that they refrained from negativing it was due merely to pressure by the British delegation; the Dominion Governments with one accord refused in any way to homologate the policy of the Labour Government in the United Kingdom on this head, and the Conservative administration itself laid aside the Protocol for the United Kingdom.

While the Imperial Conference of 1926 was insistent on denying that the relations of the members of the Empire *inter se* were those of foreign Powers, there was no lack of desire to insist on making clear to the League the distinct character of each part of the Empire which was a member of the League. This desire was partly responsible for the request duly made to the League on March 9, 1927, by Sir A. Chamberlain that League treaties should in future not be concluded in the name of States but of heads of States. It was pointed out that as a result of this proceeding there was a tendency to suggest that the Dominions and India were not on an equality with Great Britain as members of the League. Further, it was suggested that the League

should, in inserting clauses providing for the coming into force of conventions when a certain number of ratifications had been received, provide that they should come into operation when the ratification of a certain number of members of the League had been deposited. This proposal rested on the fact that the question had been raised whether, in counting ratifications, those of the Empire should not merely be deemed to be one, a result which, inevitably, suggested that in some way the Dominions and India were inferior to the United Kingdom.

It will, however, be noted that, while these suggestions stress the autonomy of the Dominions, they in no wise diminish the recognition of the connexion of the Dominions with the rest of the British Empire. Under the old system the signatures of the Dominions to League Conference Conventions (*e.g.* those on the Trade in Arms and Opium of 1923, and on Slavery in 1926) were placed after the rubric British Empire, and it has perhaps rather unkindly been suggested that this action was motived by a desire to emphasise Imperial unity at the expense of the Dominions. But if this were the case the same position results from the new form of signature, for the Dominions follow the United Kingdom, as representing the King-Emperor, and the distinctive emphasis which would have been gained by the various countries being placed in alphabetical order among foreign States is equally missing. Such a deviation from connexion with the United Kingdom would, it is clear, though apparently formal, be a very substantial inroad on Imperial unity, and the decision of the Imperial Conference on this head is one more sign of its anxiety to preserve that unity unimpaired.

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Since the Conference the election of Canada to the Council unquestionably complicates the issue, and renders it more difficult to preserve effective identity of action. But this difficulty may easily be exaggerated. There are many issues which come before the Council and the Assembly on which divergence of views within the Empire cannot do any harm and may easily tend to promote more satisfactory results, for there is no *a priori* reason to suppose that either the United Kingdom or the Dominions possess an exclusive monopoly of political intelligence. It is indeed most probable that in the Council, if they represent slightly divergent views, they may do more for the benefit of the League than if they were in accord. That is not to say that preliminary discussions between the representatives concerned would not be of value. But it is clear that, if the Dominions are to enjoy steadily representation on the Council, they must owe it to the feeling of the lesser States of the League that they have an outlook which is not precisely that of the British Empire, while on the other hand, they have influence with the British representative on the Council and can on occasion enlist the powerful support of the United Kingdom for the point of view of the lesser States. It has been well suggested that Canada or another Dominion might prove of value in the course of time of mediating between the views of the lesser and of the greater Powers. This position would certainly not be carried by mere insistence on independence *vis-à-vis* the United Kingdom; it would rather be promoted by an attitude which strove to see more clearly than can a great Power the precise point of view of the lesser States, and yet sought to reconcile their interests with those of their

powerful colleagues in the League. This delicate task, it may fairly be said, demands from the Dominion a much more intensive cultivation of the field of foreign policy than has hitherto been the case, and, in consequence, ought to be accompanied by measures to concert discussions with the British Government preparatory to Council meetings, in order that the representatives of the two Governments may not confront each other at Geneva with imperfect understanding of the points of view of the other. It is certain that in politics the first step to any reconciliation of opposing opinions is that each party should really comprehend what the other side intends.

That the new position occupied by Canada will be exercised with discretion is shown by the attempts which were made during the period of high tension in Chinese affairs to induce Canada to take up, under Article 11 of the Covenant, the question of possible hostilities between Japan and China. The Canadian Prime Minister insisted in his replies to Mr. Woodsworth, on May 14 and 16, that the only source of information which the Government had on affairs in the Far East was derived from the British Government, and that it rested rather with that Government than with Canada to take action. Moreover, he held that the real difficulties in China were matters of internal revolution, and that it was utterly premature to meditate intervention under Article 11 while other members of the League took no action, and while China herself had sent no request to the League for aid against any Japanese aggression. The attitude taken was eminently prudent and justifiable. Anything more deplorable than the spectacle of Canada, without sufficient grounds,

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attempting to intervene in an issue between China and Japan, could scarcely be imagined, and the episode illustrates to the full the reckless manner in which Labour politicians are willing to suggest the imposition on members of the League of unlimited acts of interference in the affairs of other States.

On the other hand, Canada has duly fulfilled at the first meeting in 1929 of the League Council her undertaking before election in 1927 to be a champion of the rights of minorities. Mr. Dandurand then proposed that substantial changes should be made in the procedure regarding petitions from minorities alleging unfair treatment. In place of reference merely to a Committee of three members, he thought that a larger body should be selected and that greater publicity should be given to the representations made and the replies returned, thus removing the feeling among minorities that there was a lack of interest taken in their representations and that they were disposed of without due regard. The delicacy of the situation of Canada is, of course, by no means negligible, for her own policy is opposed, as made plain in 1920, to the perpetuation of the distinct individuality of racial and linguistic units immigrating into the Dominion from Europe. Moreover, the attitude of M. Dandurand brought him into harmony with that of the German representative who bitterly attacked, on March 6, the suggestion that the minority clauses of the treaties of peace were intended to smooth over the period of transition, until the minorities merged themselves in the State of which they were subjects. He insisted instead that without disloyalty minorities should be encouraged to preserve their language, culture, and faith. The British representative

in some points took marked exception to the German view, insisting on the duty of loyalty to the State on the part of minorities, and on the desirability of their accepting complete incorporation in the State, but Sir A. Chamberlain and M. Briand frankly agreed that there should be greater publicity and that everything should be done to make minorities feel that their representations received the earnest and sympathetic consideration of the Council. The Canadian *démarche*, therefore, may be deemed to have been conducted with dexterity and with satisfactory effect.

II. *Imperial Unity within the League*

The creation of the Irish Free State was immediately followed by the determination of the Government to carry out the plan to which the Imperial Government had already promised its aid of attaining membership of the League. The application was dated April 17, 1923, and was made in the name of the Government of the State, and stated that the Government was prepared to accept the conditions laid down in Article 1 of the Covenant and to carry out all the obligations involved in membership of the League. In pursuance of the proposal the League of Nations (Guarantees) Act, 1923, was passed on August 8, which refers expressly to the application as being made by the Executive Council, doubtless as a mode of emphasising that the applicants were not acting in the name of the Crown. The Act authorised the Executive Council to give such guarantee as might be acceptable to the League of the sincere intention of the State to observe its international obligations. Authority was also given to the Council

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to accept, subject to the ratification of Parliament, such regulations as might be prescribed by the League regarding its military, naval, and air armaments. The application was duly reported on by the sub-committee of the Sixth Committee of the Assembly, which based its report on the usual replies to questions put. In answer to that regarding whether the State was recognised *de iure* or *de facto*, it was pointed out that the State was "a Dominion forming part of the British Empire upon the same conditions as the other Dominions which are already members of the League". It was also reported that the Government was stable, and provision had been made in the treaty for the delimitation of the boundary. The application was then accepted unanimously by a vote of forty-six States.

In his address to the League expressing his deep appreciation of the honour thus paid to Ireland, the President of the Council stressed the fact that "an international treaty has brought to Ireland peace", and the significance of this view was more fully appreciated when, on July 11, 1924, the representative of the League at Geneva formally registered the treaty of 1921 under the terms of Article 18 of the Covenant. That Article provides that "every treaty or international engagement entered into hereafter by any member of the League shall be forthwith registered with the Secretariat and shall as soon as possible be published by it. No such treaty or international engagement shall be binding until so registered." The Irish action, therefore, was a definite claim that the treaty between Great Britain and the Free State was an international instrument, which ought to have been regis-

tered by the United Kingdom when concluded. The notification of registration was duly made to the British Government, and elicited, after a very long delay, on November 27, a letter to the League in which the doctrine of the Free State was formally impugned: "Since the Covenant of the League of Nations came into force, His Majesty's Government has consistently taken the view that neither it nor any conventions concluded under the auspices of the League are intended to govern the relations *inter se* of various parts of the British Commonwealth. His Majesty's Government considers, therefore, that the terms of Article 18 of the Covenant are not applicable to the Articles of Agreement of December 6, 1921." This statement is remarkable because of the absence of any indication of the views of the rest of the Empire, and this omission is properly adduced as proving that it was found impossible to obtain the assent of Canada or the Union to the definite repudiation of the Irish position. Probably for this among other reasons, the reply of the Free State on December 18 to the League intimation of the British view was decidedly curt: "The Government of the Irish Free State cannot see that any useful purpose would be served by the initiation of a controversy as to the intention of any individual signatory to the Covenant. The obligations contained in Article 18 are, in their opinion, imposed in the most specific terms on every member of the League, and they are unable to accept the contention that the clear and unequivocal language of that Article is susceptible of any interpretation compatible with the limitation which the British Government now seek to read into it. They accordingly dissent from the view expressed by the British Govern-

ment that the terms of Article 18 are not applicable to the treaty of December 6, 1921." The treaty duly appeared in volume 26 of the Treaty Series of the League and the notes in the next volume.

The issue thus remained unreconciled, but incidentally it may be deemed to have been disposed of by the attitude adopted by the Imperial Conference of 1926 towards the issue of the mode of making treaties involving the United Kingdom and the Dominions. It was recommended that treaties concluded under League auspices should be couched in the name of the Sovereign: "The making of the treaty in the name of the King as the symbol of the special relationship between the different parts of the Empire will render superfluous the inclusion of any provision that its terms must not be regarded as regulating *inter se* the rights and obligations of the various territories on behalf of which it has been signed in the name of the King. In this connexion it must be borne in mind that the question was discussed at the Arms Traffic Conference in 1925, and that the legal committee of that Conference laid it down that the principle to which the foregoing sentence gives expression underlies all international conventions." It is, of course, not by any means conclusive to quote the opinion of the legal committee of an abortive Conference, and there must be set against the assumption that the principle underlies all international conventions the fact that it was held to be necessary to provide expressly in several Conventions concluded under League auspices against the application to the parts of the Empire *inter se*, for example in the Convention of 1921 on Freedom of Transit, in that of 1923 on the International Régime of Maritime Ports,

and the Convention of the same year on the Régime of Navigable Waterways of International Concern. The Irish Government also insisted on the registration of the important treaty of 1925 finally recording the settlement of the boundary issue, and the withdrawal by the British Government of any claim for the undertaking by the Free State of a portion of the British debt, and the British Government again dissented. The Irish acquiescence in the Conference resolution may be interpreted as an oblique admission of error, but it cannot be said absolutely to dispose of the issue.

The question is of importance in regard to Article 10. Do the Dominions guarantee to one another their territory and independence? If so, it follows that the rules laid down in Articles 12, 13, and 15 would apply between the members of the Empire, so that in the event of one part entering into a war in defiance of its obligations to the League, the other members would be bound to sever all relations with it, to subject it to economic measures, and even to apply naval or military sanctions. The matter cannot be deemed to be absolutely settled, because there has been no ruling by any authority which commands acceptance. It is possible to hold that the reference to "existing political independence" in Article 10 of the Covenant implicitly rules out reference to the Dominions, but that is rather a forced interpretation and one not altogether acceptable to Dominion views. On the other hand, it is possible to hold that in spirit, if not literally, the principle of Article 21 is applicable: "Nothing in this Covenant shall be deemed to affect the validity of international engagements such as treaties of arbitration or regional understandings like the Monroe Doc-

trine for securing the maintenance of peace." It may, therefore, fairly be said[1] that by international usage and recognition the relations of the parts of the Empire *inter se* are not matters of external relations, even when the language used, as in the case of the treaties with the Irish Free State, would naturally be interpreted as implying that the bonds between the members of the Commonwealth were, in truth, international in character. In favour of this view must also be set the fact that, on the International Commission for Air Navigation as originally constituted, the position of the Dominions was not permitted to be that of States external to the United Kingdom. On that body two representatives each were assigned to the United States, France, Italy, and Japan, while the United Kingdom, the Dominions, and India were, like the minor Powers, given but one seat each, and the united voting power of them all was but to be equal to that of any one of the other four great Powers. Further, by the London Protocol of June 30, 1923, the voting power of all States was equalised, Great Britain, the Dominions, and India counting as one State.

III. *The Dominions and the Permanent Court*

The distinct status of the Dominions was duly recognised when the Permanent Court of International Justice was brought into existence. The Statute left it open for each member of the League to act independently, so that any Dominion might act separately and independently of the Empire in regard to matters falling within the sphere of jurisdiction of the Court,

[1] Keith, *War Government of the British Dominions*, pp. 157, 158.

though, as we have seen, it is now accepted that the Court is not an appropriate tribunal to decide issues between the different parts of the Empire, though members of the League.

Appointment of members of the Court at once raised difficulties. The decision rests with the Council and the League, but the candidates must be nominated, and normally nominations are made for each member by the national group in the Court of Arbitration at the Hague under the Hague Convention of 1907. In the case of the Dominions, however, which had no distinct representation on the Hague Court, it was necessary to apply an analogous procedure as provided in the Statute of the Permanent Court, and to entrust the nomination of candidates to national groups, appointed for this purpose by their Governments, under the same conditions as those prescribed for membership of the Permanent Court of Arbitration. But it was laid down that no group could nominate more than four persons, of whom not more than two could be of the nationality of the group. This at once raised a difficulty as to the meaning of nationality, which was strengthened by the provision in Article 10 of the Statute that, if more than one national of the same member of the League were elected, only the eldest would be finally chosen as a member of the Court. If all British subjects were to be treated as having a single nationality, there could never be more than one representative of the Empire on the Court. This derogation from the rights of the Dominions, however, would have been intolerable, and it was recognised that the term national must be restricted in sense, so that, for instance, Canada could have nationals of its own as contrasted with the United

Kingdom, and so on. Canada accordingly gave a lead to the Dominions in 1921, by defining, with a view to this contingency, the nature of Canadian nationals, and the Union of South Africa and the Irish Free State have recognised the same distinction.[1]

Acceptance of the protocol establishing the Permanent Court was at once given by the signatures of the representatives of New Zealand, the Union of South Africa, and India, at the League Assembly of 1920. The mode of signature adopted was unusual, for the representatives signed according to the alphabetical order of members, and the Dominions were not grouped with the British Empire. Canada and the Commonwealth availed themselves of the option of later signature. In each case ratification was required and accorded by the Governments of the members. In the case of the Irish Free State the position was peculiar, for the Free State was not in existence when the protocol was accepted for the United Kingdom, and, while the protocol applied to it in a sense, it was not applicable to it in its special personality. The matter, however, was adjusted by the notification of the Irish Free State in 1926 (August 25) to the Court that it accepted membership in the same way as other parts of the Empire.

Two issues of importance have since arisen regarding the attitude of the Empire towards the Court. Article 36 of the Statute provides that members may declare that they recognise as compulsory, in relation to any other member of State accepting the same obligation, the jurisdiction of the Court in all or any of certain classes of legal disputes. These classes include

[1] See p. 64 *ante*.

the interpretation of a treaty; any question of international law; the existence of any fact which, if established, would constitute a breach of an international obligation; and the nature or extent of the reparation to be made for the breach of such an obligation. The issue whether this clause should be taken advantage of by any part of the Empire has long been discussed, and British opinion, on the whole, despite the efforts of Lord Cecil and the League of Nations Union, is not convinced of the wisdom of accepting compulsory reference even in these cases. The ground for this opinion is partly that there may arise matters on which a judicial decision is not really what is wanted, but which would better be disposed of by diplomacy or arbitration by a chosen body. In part also it is held that the jurisprudence of the Permanent Court is still too imperfectly understood to render acceptance of its jurisdiction in matters so wide a prudent course of action for the Empire, especially as the Court is also made the final authority as to whether any matter falls within the classes of cases enumerated. At the Imperial Conference of 1926 the opinion of the Conference was that it would be premature to accept the obligation under the Article, and the important agreement was reached that none of the Governments of the Empire would take any action in the direction of the acceptance of the compulsory jurisdiction of the Permanent Court without bringing up the matter for further discussion. The importance of this agreement is very noteworthy, for it lies in the power of each member, without the approval and in face of the strongest objections by the British Government, to accept the compulsory jurisdiction. On the other hand, there is

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obviously a very strong objection to any such procedure. Under it some issue deeply affecting one Dominion, on which it would not be prepared to go to the Court, might be decided as regards another Dominion, and, though the decision under the rules of the Court would have no effect for the Dominion which was not a party in the cause, there can be no doubt that the foreign State might press strongly that the views of the Court proved that the Dominion was internationally in the wrong. This consideration, at least as much as respect for the views of the United Kingdom, explains the attitude of caution adopted by the Conference. On the other hand, as was pointed out by a Labour member in the Canadian House of Commons on April 11, 1928, there was prevalent in the United Kingdom the impression that refusal to accept the compulsory clause in the case of the United Kingdom was dictated by the desires of the Dominions. Canada, however, clearly is not strongly influenced by any such feeling, and the Dominion Government accepted the view that it was now proper to reopen with the British Government the issue, so that Canada might consider the question of acceptance without departing from the agreement reached in 1926. In Australasia, on the other hand, the idea of accepting compulsory reference of any matter to the Court is opposed on the score that, under this power, the question of immigration restriction might be brought before the Court. It is true that immigration is, on the whole, admitted to be an issue of domestic jurisdiction, which cannot be dealt with as a question of international concern, but there remains just the possibility that this principle may become inapplicable, and

Australia is convinced that in no case can the risk of a condemnation of her policy of restriction of Asiatics be challenged. Anxiety on this point prevented acceptance of the Geneva Protocol of 1924, and it will not be easy to convince Australian opinion that acceptance of any compulsory reference is safe, unless it is made with complete reservation of immigration questions. Similarly, it is admitted that, even if the United Kingdom had been willing to submit to compulsion in any cases, it would be necessary to exclude prize law so long as the British and continental views on this issue are so different.

The second issue of importance as affecting Dominion status was raised on the occasion of the revision of the Statute of the Court undertaken in 1928–9. The British Government then suggested that the Statute should be framed so as to make it permissible, in the event of a Dominion being engaged in a case before the Court, for that Dominion to have a national judge on the Court for the occasion despite the presence on the Court of the British judge. It is difficult to approve this proposal, which, though regarded with benevolence by Mr. Elihu Root, was not received with enthusiasm on March 19, 1929, by the other members of the body set up to study the amendment of the Statute. The British argument stressed the independent character of the Dominions, but it did not remove the really fatal objection from the international point of view that the Dominions are united in strong ties of common interest to the rest of the Empire, and that a British judge could hardly be regarded, *e.g.* by Turkey or Japan, as impartial in a dispute between either Power and Canada or Australia.

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Moreover, assuming perfect impartiality, there would remain the objection that a Dominion judge would represent the same English school of international law as does the British judge, and would tend to agree with and duplicate his attitude. From the Imperial standpoint it is not easy to approve the proposal, for it would be extremely unpleasant from a national point of view for a British judge to have to deliver a judgment disallowing the contentions of a Dominion Government. However honestly he might hold his view, and however strongly it might be supported by legal grounds, the public, if not the Government of the Dominion, would regard the issue very much as Lord Alverstone's surrender to the American views on certain points of the Alaska Boundary case was regarded in Canada. The true solution of the difficulty would rather be to allow the British judge to retire from the Court on such occasions, and to have his place filled for the hearing of the case by a Dominion judge, unless the Dominion Government expressly asked that the British judge should act in view of his eminence as a lawyer and the weight he would have with his colleagues on the Court, as compared with a Dominion judge who would probably be little known outside his own country, and in any case would have had minimal experience in international issues.

On the same occasion the British representative expressed concurrence in the proposals for adapting the Statute to permit of the acceptance by the United States of the protocol. This had been foreshadowed by the attitude of the Dominions at the Imperial Conference of 1926, when agreement was expressed in the attitude adopted by the British Government towards

the conditions on which the United States was ready to accept the jurisdiction of the Court. The one real point of difficulty, that regarding the claim of the United States to veto the giving of an advisory opinion on any issue in which the United States claimed to have an interest, ought to be deemed to be satisfactorily disposed of by the new proposals initiated by the Government of the United States.[1] Whether, however, in any event Canada and the United States would care to submit any dispute between them to the Court, may be doubted.

IV. *The Dominion Mandates*

Of special interest as assertions of the distinct sovereignty of the Dominions is the régime of mandates, for in regard to them the Dominions exercise authority subject only to the control of the League. The mandates for the German possessions in the Pacific south of the equator, except Samoa and Nauru, were conferred upon the King to be exercised by his Government of the Commonwealth of Australia, that for Samoa was to be exercised by the Government of New Zealand, and that for South-West Africa by the Government of the Union, while the mandate for Nauru was conferred on the British Empire, and under an agreement between the United Kingdom, the Commonwealth, and New Zealand was to be administered under an arrangement to secure the due regard for the interests of these parts of the Empire, to the exclusion of the other Empire Governments.[2]

[1] Accepted on March 18, 1929, by the Committee of Jurists.

[2] Keith, *Responsible Government in the Dominions*, Part V. chap. xiv.

A decidedly advanced view of the position thus created was at once taken by the Union Government. It held that, as the mandate was bestowed direct upon it, it was endowed with a species of sovereignty over the territory, and that as a result of this sovereignty it was open to the Parliament of the Union to pass legislation for the peace, order, and good government of the territory, and to provide it with a Constitution. After some experience of the administration of the territory, it was decided in 1925 to grant a measure of self-government, and a complex administration was created under which there is a Legislature, two-thirds elective, and an Executive Committee which controls the administration of those matters on which the Legislature has power to pass ordinances. There are, however, reserved from the power of the Legislature many important issues, over which the Government of the Union reserves full legislative and administrative authority in order that it may be able to carry out completely its obligations to the League under the terms of the mandate. The legislative authority thus exercised by the Union Parliament cannot be justified under the Union Constitution of 1909, and, therefore, it must be deemed to have been created by the treaty of peace and the action of the League, a situation absolutely novel in the British Empire. The validity of this legislation has not been questioned in the Courts, and in the case of Christian[1] it was held by the Appellate Division of the Supreme Court of the Union that the Union possessed a measure of sovereign authority over the territory mandated to it, so that rebellion against it was technically a breach of its *maiestas*. The

[1] [1923] A.D. 101.

opinion of the South African Court is, of course, not of any conclusive value as a matter of international law, and the question of the precise character of the Union rights over the territory has been considered on more than one occasion by the Permanent Mandates Commission of the League of Nations, which took exception to the assertion in the preamble to an agreement between the Government of the Union and the Government of Portugal that the Union possessed sovereignty over the mandated territory. This claim was defended at first by General Hertzog, but later the attitude of the Union was somewhat modified, and it appears clear that there is some inexactitude in the adoption of the term sovereignty in this connexion.[1] The fact is that the mandatory system is so anomalous that it is not possible to assert definitely where the sovereignty resides, and the power of legislation and administration possessed by the Union is subject to certain definite restrictions. Of these one of the most important is the inability of the Union to grant to the territory either internal or external sovereignty, for the mandate is one for the administration of the territory as an integral part of the Union, and not a cession of unlimited authority. Further, the terms of the mandate cannot be altered save with the sanction of the Council of the League, and this provision, now that Germany is a member of the Council of the League, effectively bars any attempt to secure the incorporation of the territory as a fifth province annexed to the Union without the assent of that Power.

It must be added that the supervision of the League over the action of the Union has been far from easy.

[1] *The Round Table*, xviii. 217-22.

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The most unfortunate episode was the repression of a rising of the Bondelzwarts, a Hottentot tribe which had served the Union well in the war. The Administrator led a force into their reserve, and with the aid of aeroplanes destroyed over a hundred men, women, and children. The excuses urged by the Administrator for his action failed to satisfy the Mandates Commission, which condemned his mode of treating the Bondelzwarts, approved the more conciliatory methods later adopted, and urged that assistance should be granted to the poverty-stricken natives.[1] The utter incompatibility of the ideals of the mandatory system and the views of South Africa is brought out in perfection in the pronouncement of the Chairman of that body when he insisted that the trusteeship principle involved a radical change in the form of administration: "First in importance come the interests of the natives; secondly, the interests of the whites. The interests of the whites should only be considered in relation to the direct or indirect exercise of protection over the natives." In point of fact, of course, the view of the Government of the Union and that of the Administration of the mandated territory is, and can only be, that the chief purpose served by the natives is to offer a source of labour for the white population. This is the position deliberately assigned to the natives by the policy of the Union for the natives within its actual areas, and it would, in the view of the Union Government, be absolutely impossible for it to treat differentially natives in the mandated territory, in view of the repercussions of such a policy on feeling among the natives in the Union.

[1] Walker, *History of South Africa*, pp. 595, 596.

A very much more modest view of the amount of sovereignty involved was taken by the Government of New Zealand, which determined to place its jurisdiction over Samoa on the basis of an Order in Council under the Foreign Jurisdiction Act, 1890, of the Imperial Parliament. This attitude negated any independent source of authority other than the King and the Imperial Parliament, and, though the same power of independent legislation might perhaps have been admitted by the New Zealand Courts to exist, it can hardly be doubted that the actual procedure adopted was prudent and useful. The Imperial Order delegated legislative and administrative authority in full measure to the Dominion Parliament, which in due course provided Samoa with a well-thought-out administrative system. Various causes have combined to render the work of the administration extremely difficult, and the existence of the mandate has sometimes been regretted, but at any rate there can be no doubt of the fundamental fact that the aims of the New Zealand Government have been entirely in accord with the spirit of the mandate, and that, if there has been any failure to secure these ends, the fault has certainly not been mainly that of the Dominion administration.[1] Since the advent to office of the Liberal Government under Sir J. Ward at the close of 1928, fresh efforts have been undertaken to secure the maximum amount of harmony.

In the Commonwealth the power of the Parliament to legislate was assumed, and could be justified on the ground that the Constitution gives authority to legis-

[1] *The Round Table*, xviii. 664-83, 900-903. For judicial approval of the South African doctrine, see *Tagaloa* v. *Inspector of Police*, [1927] N.Z.L.R. 833, 900.

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late for any territory placed under the authority of the Commonwealth by the Crown, a position sufficiently applicable to the status of the German colonial territories in New Guinea and the islands. The control exercised by the Mandates Commission was for a time resented in the Commonwealth, but there has been latterly greater appreciation on the part of the Commission of the excellent intentions of the Commonwealth Government, and on that of the people of Australia of the honourable and disinterested motives animating the Commission in its difficult duty of supervision. More serious has been the misunderstanding as to the case of Nauru, under mandate to the Empire, for it was difficult for the Commission to realise that due care for native rights was not incompatible with the maintenance as a governmental business of the exploitation of the phosphate deposits. But to the initiative of the Commission is due the greater care taken to supervise the operations of removal of the phosphate, and to provide a fund for the permanent benefit of the inhabitants whose property is thus being destroyed. As first operated there was a tendency to ascribe too great a freedom from control by the administration to the Commission operating the removal of the phosphate, but this defect in the system has been eradicated.

An interesting outcome of the supervision exercised by the League Commission was the realisation by the Dominions that they had problems to face which were similar to those affecting the United Kingdom, and which could best be dealt with by joint action. Thus a united stand was made in 1926, after discussions between the various Governments of the Empire on

the occasion of the Imperial Conference, against the proposal of the Mandates Commission that it should exercise the power to hear petitioners against actions of the mandatory Powers in person, and that the Mandatories should be required to supply detailed information on a most extended scale in accordance with a very long questionnaire which had been drafted. It was insisted by the Governments of the Empire in unison that the proposals implied a fundamental misunderstanding of the scope of the functions of the Commission. That body was intended merely to see that the administration was being carried on in accordance with the ideals laid down in Article 22 of the League Covenant; if it had reason to believe that these ideals were not being attained, it was at liberty to investigate and to advise the Council as to the situation. But it was never intended that the Mandatories should report to it annually for criticism or confirmation all the details of its legislation or administration. Experience had shown that the Colonial Office was able to dispose of petitions without affording a hearing to petitioners, and the same ability should be manifested by the Commission, while the list of questions involved many matters which, in the British colonies, were left to the discretion of the local Governments. The objections of the Governments were not, perhaps, wholly well founded, but they reflected one essential fact—the rule that the Commission is not to perform the functions of a central office of control, but is merely charged with the duty of examining the annual reports of the Mandatories and reporting on them to the Council. This is a very valuable function, especially as it is the rule that the views of the responsible repre-

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sentatives of the Governments concerned are ascertained verbally, and that the fullest opportunity is thus given for the Commission to exercise legitimate influence on the progress of administration without interfering directly with the sovereign authority of the mandatory Power.

It must be remembered that the Commission has no executive functions. All that it can do is to report to the Council of the League, which again has no direct means of enforcing its opinion on the Mandatory, unless conceivably by the revocation of the mandate on a vote of all the Powers on the Council save the Mandatory itself. Even this power is denied by some authorities,[1] and in any case the only effective check on the Mandatory is the public opinion of the League, and the right, under the mandates, of members of the League to demand a decision by the Permanent Court of issues arising between them and the Mandatory as to the application of the terms of the mandates. This measure of authority granted to other members of the League is clearly meant to secure the interests of their nationals,[2] and is not a method of enforcing the clauses of the mandates in favour of the natives, save in so far as this may indirectly be done through preventing the differential treatment of subjects of other States who desire to enter into trade relations with the natives. But in the case of the Dominion mandates this measure of protection is inapplicable, as the privileges of other members of the League do not include commercial equality.

[1] Wheaton, *International Law* (6th ed.), i. 109.

[2] *Mavromattis Palestine Concession Case*, Permanent Court of International Justice Publications, Series A, No. 2.

Limited, however, as it is, there can be no doubt that the measure of League control is far greater than that exercised by the Imperial Government over the native policy of the Dominions in regard to the natives in their own territories. As we have seen, these issues have practically all been left by constitutional usage to the unfettered disposal of the Dominion Governments, and any adverse criticism has been avoided. Questions and debates in Parliament on issues relegated to the charge of the Dominions are ruled out of order, and the Dominions, therefore, are spared the frank exposure of errors, real or imaginary, in their administration to which, in respect of the mandates, their operations are regularly subjected in the published reports of the Mandates Commission.

V. *The Dominions and the Labour Organisation of the League*

As has been noted, Sir R. Borden took a leading part in securing that the Labour clauses of the treaties of peace should be based on a full acceptance of the separate membership of the Dominions in the League. The Commission on International Labour Organisation insisted on drafting a convention which negated the Dominion claims, and even when Sir R. Borden in the Plenary Conference carried an instruction to the drafting Committee to remodel the convention on the lines of the League Covenant, that body remained obdurate, and it was only by vehement insistence on the issue before the Council of Four that Sir R. Borden was able to carry his point and obtain a peremptory instruction for the Committee to remodel the clause.

In point of fact, when at Washington the International Organisation was set on foot, Canada was elected a member of the governing body, and now occupies that position as one of the eight most important industrial countries of the world.

The Dominions, of course, have exercised complete freedom in their attitude towards the various conventions and recommendations arrived at under the procedure of the organisation. But it cannot be said that they have contributed in the manner which might have been expected to the advancement of the purposes of the organisation by ratification of draft conventions. This has been due in some considerable measure in both Canada and the Commonwealth of Australia to the peculiar difficulties affecting federations, where the power to legislate on labour conditions in general rests with the local and not with the central legislatures. Thus up to March 1, 1928, Australia had ratified only one convention, that of 1920 on Employment for Seamen, and Canada only four, those of 1920 on the minimum age for employment at sea, and unemployment indemnity, and of 1921 as to the minimum age for stokers and trimmers, and medical examination for young persons at sea. But no such excuse applies to South Africa, which ratified the conventions of 1919 on unemployment and light work for women, and that of 1925 as to equality of treatment for foreign workers as regards workmen's compensation, but no other conventions. New Zealand, whose activity in social advance is famous, is not credited with a single ratification. Only the Irish Free State and the United Kingdom have ratified a considerable number of conventions, while the Free State has formally recognised

that it is bound by certain of the conventions which were ratified by the United Kingdom before the appearance of the Free State as a distinct entity. The State, of course, since its entry into the League of Nations, has ranked as a member of the organisation in its own right. The Dominions, however, have all agreed to ratify the proposed alteration of the composition of the governing body in order to increase its size, but the lack of sufficient ratifications has delayed the adoption of this proposal since it was agreed on in 1922.

CHAPTER XVIII

THE NEGOTIATION OF TREATIES

I. *The Treaty Power*

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THE arrangements for the exercise of the treaty power in respect of the Dominions had attained, as we have seen, a measure of completeness by the year 1914, which seemed to exclude any serious difficulty. But the doctrine that each Dominion should be represented separately and sign separately general conventions introduced the conception of a new procedure, which triumphed in 1923 in Canada. It appeared tardily, no doubt because the occasion for the assertion of the novel claim was lacking. The necessity of concluding a fresh commercial convention in 1921 with France led to no innovation, but the usual method of signature, together with the British representative at Paris, was followed, and Mr. Fielding insisted on the same procedure in 1923, when he brought to a successful conclusion the negotiations for a trade agreement with Italy. He met suggestions that the association of an Imperial representative in signature was unnecessary, by asserting that he appreciated the honour of signing with the Foreign Secretary.

A definite change, however, took place a little later when the Government of Canada had negotiated a

treaty with the United States for the preservation of the halibut fishery of the North Pacific Ocean. It was then proposed by the Dominion Government that Mr. Lapointe, who had been concerned in the negotiation of the treaty, should alone sign it, but the British Ambassador at Washington on February 23 replied to this proposal to the effect that his instructions from the British Government required him to sign the treaty jointly with Mr. Lapointe. There ensued an exchange of views between the two Governments, which ended in the surrender of the British Government and in the signature of the treaty by Mr. Lapointe alone with the United States Secretary of State. The signature was given by authority of full powers issued by the King to Mr. Lapointe in the usual manner on the advice of the Secretary of State for Foreign Affairs, though, of course, at the instance of the Dominion Government, and Mr. Lapointe, therefore, was in the fullest sense a representative not merely of the Canadian but also of the Imperial Government. The treaty also was not expressed to be by the King in respect of Canada, but merely by the King-Emperor under the usual style, and the only limitation to Canada was that implied in its terms. It thus resembled in everything, save the number and character of the signatories, the many treaties hitherto concluded for the special interest of a Dominion, but in the name of the King-Emperor without specification or limitation. It is difficult [1] to understand how seriously the new departure was taken in certain quarters in England as well as in the Dominions and the United States. It seemed to be a natural development of the principle of the separate signature

[1] See Sir R. Borden, *Canadian Bar Review*, iii. 515.

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of the peace treaties; there the Imperial Government had plenipotentiaries to sign, because it was interested as well as the Dominions; here the Imperial Government had no special interests, and therefore no separate signature was required.

On the other hand, it was contended that the joint signature by a British diplomatist attested the participation of the Imperial Government in the making of the treaty. The answer to this contention, of course, was that the participation of that Government was secured in a more effective and simple manner. The full powers issued to Mr. Lapointe were granted by the Imperial Government, and therefore he could not have signed save with the prior approval of the Imperial Government, which in fact was duly accorded. Secondly, when signed, the treaty remained to be ratified, and that ratification, when finally accorded, was carried out with the approval of the Imperial Government. But there was another aspect of the case which aroused difficulties with the Senate in the United States. The treaty was negotiated by Canada with a strict eye to Canadian conditions and to restrictions to be imposed, on the one hand on citizens of the United States, and on the other hand on Canadian British subjects or residents. But the Senate was quick to see that there might be a lacuna here, and accordingly proposed in its wonted manner to alter the substance of the treaty under the guise of an understanding on ratification. In this case the understanding was that "none of the nationals or inhabitants on boats or vessels of any other part of Great Britain shall engage in the halibut fishery contrary to the provisions of the treaty". It was this point of substance rather than the formal

innovation or the political or territorial aspect of the treaty which moved the Senate, for it realised that the whole purpose of the treaty might conceivably fail if British subjects on non-Canadian ships carried on the fishery in defiance of the compact, which bound only Canadian vessels. But this reservation, of course, completely altered the nature of the treaty. If the treaty were to apply to other parts of the Empire, the approval of these parts must be formally obtained, and the United Kingdom must be asked to assent for her part to the convention. This was no part of the Canadian intention, and, as a result, the ratification was delayed until October 22, 1924. The Senate had finally yielded and had ratified the treaty without the proposed interpretation, thus reducing it to the level of a mere treaty affecting Canada. On the other hand, the legislation[1] passed by Canada to secure the operation of the treaty was originally expressed too widely, for the Act of 1923 purported to authorise the seizure and forfeiture of foreign ships generally as a penalty for fishing in the close season agreed upon. The amending Act of 1924 accordingly duly limited the application of the Act to inhabitants and nationals of Canada or the United States, and forfeiture of vessels was confined to Canadian vessels.

This incident, though its importance was much misunderstood and often misrepresented, as in South Africa, where it was declared to prove that the Dominions possessed the treaty power absolutely independently of the Imperial Government, need not have raised any serious discussion. But the treaty issue was raised also in connexion with the International Con-

[1] See p. 227 *ante*, as to its extra-territorial character.

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ference to conclude peace with Turkey and to settle the future of the Straits connecting the Black Sea and the Aegean, and the Imperial Conference of 1923 endeavoured to elucidate the issues more satisfactorily. The rules which emerged from this discussion may be summed up as follows. Any Government, whether British or Dominion, which desired to negotiate a treaty should take care to inform any other Government which was likely to be interested, in order that it could consider what its attitude towards the negotiations should be, and whether it should participate in the negotiations. There should be the most complete consultation between Governments interested, and care should be taken to keep Governments which did not participate informed of any matters arising in which they might be interested. When treaties had been negotiated, they should be signed by plenipotentiaries representing the Government concerned, and the full powers issued should make clear the part of the Empire in respect of which the treaty was concluded, while the extent of the application of the treaty should further be made clear in the preamble and text. Where the treaty imposed obligations on more than one part of the Empire, it should be signed by one or more plenipotentiaries on behalf of all the Governments concerned. Ratification similarly should be effected in the case of a treaty imposing obligations on one part only of the Empire at the instance of the Government of that part; if more than one part were affected, ratification should be carried out after consultation between the Governments concerned. Each Government must be the judge whether Parliamentary approval or legislation was requisite

before desire for, or concurrence in, ratification was expressed.

At the same time, formal approval was for the first time given to the conclusion of agreements of a non-treaty character, usually on technical or administrative matters, by Governments. Such agreements differ from treaties in that they are not concluded in the name of the King, and are not ratified by the King, though they may be subject to confirmation by the Governments; the negotiators do not receive full power from the King, but merely instructions from their Governments. Each Government is solely responsible for such agreements, but it was recommended that any Government which intended to negotiate such an informal agreement should communicate its intention to the Government of any other part of the Empire which might be affected in order to give it a chance of expressing its views.

It is impossible to deny that the resolutions of the Conference of 1923 were sadly lacking in precision, and their operation in practice was not flawless. They had the merit of clearing up the question of the halibut treaty, and of justifying *ex post facto* the omission of the Imperial representative's intervention in the step of signature. Hence, very tardily, the treaty appeared in the British Treaty Series under the guise of a treaty between Canada and the United States. But it soon proved in 1924, in the rather acrid controversy over the ratification of the treaty of Lausanne,[1] that there was much scope for divergence of view as to the exact working of the resolutions of 1923, and the conference of 1926, while approving generally of the principles

[1] See p. 393 *post.*

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thus laid down, suggested certain modifications. One of prime importance was the clearing up of the deplorable ambiguity of the rule as to consultation inculcated in 1923. It was then left to each Government to use its judgment as to whether any other Government was likely to be interested, and only if it thought it would be was there any obligation for a Government proposing to negotiate to communicate with the other Government. It was now laid down that any Government contemplating a negotiation must inform all the other Governments so as to leave it to them to say whether they were likely to be interested. "When a Government has received information of the intention of any other Government to conduct negotiations, it is incumbent upon it to indicate its attitude with reasonable promptitude. So long as the initiating Government receives no adverse comments, and so long as its policy involves no active obligations on the part of the other Governments, it may proceed on the assumption that its policy is generally acceptable. It must, however, before taking any steps which might involve the other Governments in any active obligations, obtain their definite assent."[1] Well intended as this rule was, it is clear that it left much vague, and even less satisfactory proved the additional proposal which ran: "Where by the nature of the treaty it is desirable that it should be ratified on behalf of all the Governments of the Empire, the initiating Government may assume that a Government, which has had full opportunity of indicating its attitude and had made no adverse com-

[1] The necessity of common action as regards the United States arbitration treaty resulted in 1928–29 in prolonged negotiations between the Dominions and the United Kingdom.

ments, will concur in the ratification of the treaty. In the case of a Government that prefers not to concur in the ratification of a treaty unless it has been signed by a plenipotentiary authorised to act on its behalf, it will advise the appointment of a plenipotentiary so to act." The fundamental unsoundness of this proposition was that it introduced a measure of uncertainty and confusion into the management of Imperial affairs. Under it a Dominion might suddenly find that another Dominion or the United Kingdom would have carried on negotiations of which the Dominion, though informed, had not realised the importance, and that a demand for concurrence in ratification would be justly preferred according to the terms of the Conference resolution, but that objections to the proposal would now suggest themselves.

It is indeed difficult not to regard the proposals as being in a sense a vindication of the position of the British Government in its handling of the Lausanne treaty. That had been carried out without protest from Canada, and it had been assumed by the British Government that the Dominions, as they had not objected to the terms of the treaty, would concur in ratification, as indeed all save Canada were ready to do. But clearly it would have been better to insist that Governments must be explicit, and that there should be no question of mere understandings, and, as will be seen, the vagueness of this provision caused some misunderstanding between Canada and the United Kingdom regarding the abortive negotiations of 1928 to secure an accord on proposals for the reduction of armaments between the United Kingdom and France.

On the other hand, the Conference rendered good

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service in definitely repudiating, both as regards treaties negotiated under League auspices and other treaties, the practice which had grown up of concluding the treaties between States and not between their Sovereigns, incidentally, as we have seen,[1] negativing the doctrine that treaties concluded in this form were effective as between the members of the British Empire. It was agreed that, when the Governments of the Empire were willing to apply *inter se* some of the conditions laid down in international agreements as administrative measures, they should state the extent to which, and the terms on which, such provisions should apply. Rather cryptically it was added that "where international agreements are to be applied between the different parts of the Empire, the form of a treaty between heads of States should be avoided". It seems clear that, so far as agreements are international, the form adopted should be that of treaties between heads of States, and that any inter-Imperial operation should be achieved quite independently of the international agreement by a consent made in the names of the Governments of the Empire *inter se*. That the form of an international agreement should depend on the volition of the Governments of the Empire as to its application to their mutual relations seems unsatisfactory.

It was also agreed that all treaties should definitely make it clear for what part of the Empire they were really signed, and that accordingly the term British Empire should be divided into the essential groups, Great Britain and Northern Ireland and all parts of the British Empire which are not separate members of

[1] See p. 350 *ante*.

the League—Canada, Australia, New Zealand, South Africa, Irish Free State, and India. It was suggested that even in cases where active obligations were not to be imposed on any part by a treaty, yet if the British subjects connected with that part might be affected by its operation, authority should be given for the signature of the treaty for that part by some of the plenipotentiaries acting for other parts.[1] Here again it is probable that the making of clear and quite specific provision for more active co-operation would have been desirable.

Further difficulties were found to arise as regards the question of the position of the Dominions towards the relations of the United Kingdom and Egypt. The position of Egypt was decided on December 18, 1914, by the Imperial Government's action in declaring it a protectorate in order to remove the anomalies arising from its nominal inclusion in the Ottoman Dominions. The errors of the British régime in Egypt in the latter stages of the war may be admitted, but an effort was made in 1922 to improve the situation by the concession by unilateral declaration, in default of any possibility of agreement, of the independence of Egypt subject to the reservation of certain important points. These were (1) the security of British Empire communications, especially as regards the Suez Canal; (2) the defence of Egypt against foreign interference; (3) the protection of the interests both of foreigners and of minorities; and (4) the issue of the Sudan. Progress in clearing up these outstanding points was very hard to make, for the attitude of successive Egyptian

[1] This plan has been followed in the treaties of 1928 as regards China and Persia.

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Governments was hostile to any *rapprochement* with the United Kingdom, and Mr. Ramsay MacDonald's effort to arrange terms with the Egyptian patriot Zaghlul Pasha unhappily were abortive. Relations between the two countries were then embittered by the assassination of Sir Lee Stack, the Sirdar of the Egyptian Army, and by the excessive harshness of the British measures to exact reparation, which went so far as to menace interference with the sources of the water supply of Egypt. Ultimately relations improved, and under the ministry of Sarwat Pasha in 1927 there appeared to be some hope of the conclusion of a treaty of alliance which would have paved the way to the attainment by Egypt of a more complete sovereignty. In the case of this treaty the Dominions as usual were not prepared to bind themselves actively, or at least this was the attitude very firmly adopted by Canada. Exception was taken, as was explained by Mr. Mackenzie King in the Dominion House of Commons on March 30, 1928, to the proposal to conclude the treaty in the name of the King without restricting the application of the compact. The explanation of this action is doubtless simple, and it is absurd to put it down to inadvertence on the part of the Foreign Office, though some colour is given to this view by the remarks of Lord Salisbury in the House of Lords on April 26. The treaty was one of alliance, and might, therefore, involve the Empire in war; on the other hand, it imposed no active obligation on any Dominion, and the Foreign Office doubtless thought that the proper method of concluding the treaty was simply to make it in the name of the King without limitation of application. The Dominions were given full opportunity to

consider the proposal in advance, so that, if they did not object or ask for special representation, they might, under the principles of the Conference of 1926, be supposed to accept the view that they were not specially concerned and need not trouble to intervene. But Canada, on the other hand, preferred to negative absolutely any connexion with the treaty, and this was at once effected by limiting its application to the United Kingdom. The compact, however, never became effective, for Sarwat Pasha's colleagues declined to accept the proposed treaty, and shortly after his resignation a dispute between the King and the new Government resulted in a *coup d'État*, under which the legislature was forbidden to function and the State was ruled unconstitutionally. None the less, the British Government in March 1929 concluded a financial agreement with Egypt dealing with the issue of the relations of Egypt and the United Kingdom to the payment of interest on the guaranteed Ottoman loan, the burden of which fell on the latter, while on the other hand the Ottoman tribute due by the former was withheld and applied towards the service of the debt. In this negotiation, of course, the Dominions were not expected to take part, the debt being a matter wholly for the United Kingdom. Some exception was naturally taken in Egypt to the conclusion of an agreement of this sort at a time when Parliament had been unconstitutionally prevented from functioning. The Egyptian usurpation was, it was pointed out, in reality upheld by the presence of the British garrison of occupation, seeing that it would be called upon to put down any disorder, and thus the Government which concluded the settlement was really without legal authority, and was com-

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pelled to sacrifice Egyptian interests in order to secure a continuation of its unlawful power. For this, among other reasons, it is clear that any attempt to secure Dominion support for British policy in Egypt would have been essentially unwise.

It must, however, be remembered that, though the proposed treaty with Egypt would have been concluded for the United Kingdom and not for the Empire, all British subjects would have been affected ultimately by its terms, while the interests of the Dominions in the Pacific might have been impaired by the sacrifice of security of control over the Suez Canal, which might have eventuated from its terms. The British Government in fact often cannot act without affecting indirectly the interests of the Dominions or their subjects. If it consents to agree to the reference of the issue of navigation of the Oder to the decision of the Permanent Court of International Justice, though the Dominions are not made parties to the agreement, the results of the reference may affect the actions of Dominion subjects.[1] If it arranges with Siam the issue of the navigation of the Mekong, the arrangement must apply to British subjects connected with the Dominions.[2] This general authority is, it must be remembered, often of the highest value to the Dominions, but it involves also the imposition of certain disabilities. The Imperial Conference of 1926 clearly felt that the matter did not permit of simplification or of assertion of Dominion autonomy.

It must indeed be admitted that the result of the procedure adopted under the Conference resolution of

[1] Parliamentary Paper, Cmd. 3250 (1929).
[2] *Ibid.* Cmd. 3262.

1926 with regard to certain types of treaties creates a rather perplexing situation. Thus the treaty of December 14, 1927, with Iraq is concluded between the King-Emperor and the King of Iraq, but the plenipotentiary for the King-Emperor is a signatory for Great Britain and Northern Ireland only. Yet the treaty recognises Iraq as an independent Sovereign State. Is it to be understood that the Dominions are not bound by this recognition unless they formally confirm it? This seems an impossible interpretation, for the words of Article 1 are simply, "His Britannic Majesty recognises Iraq as an independent Sovereign State", without limitation of the extent to which His Majesty is acting, and it is impossible to split up the Crown in such a case into several distinct sovereignties. Here again we have the fact that the United Kingdom can, in effect, bind the Dominions by a treaty which was not signed by any Dominion delegate and which does not purport to bind the Dominions. Again, the variations of the Statute of Tangier contained in the Protocol of July 17, 1928, were concluded by a representative of the British Government alone, but, none the less, Dominion British subjects in Tangier must accept the alterations in the régime which are thus effected. Or again, if the arrangement at one time contemplated, for the admission of the right of Norway to reckon as territorial a considerable area of waters beyond the ordinary three miles limit, had ever been concluded, it is clear that though it would not have been signed by Dominion representatives, Dominion subjects and ships would have been bound to admit the sovereignty of Norway over these waters, despite the claim that might otherwise have rested on the rules of international law. The

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Governments of the United Kingdom and the Irish Free State without the concurrence of other Empire Governments have accepted a delimitation of French fishery rights in Granville Bay, which is valid against the whole of the Empire.[1]

Moreover, the power of the Imperial Government to bind the Empire is such that, if it is not intended that a general treaty shall extend to the Dominions, it is essential to specify definitely in such an instrument that the Dominions are not affected. Thus, in the notes exchanged between the Government of the United Kingdom and the United States Government on May 19, 1927, regarding the disposal of certain pecuniary claims arising out of the war of 1914–18, it was held necessary expressly to exclude from the operation of the agreement claims affecting the British Dominions or India, and British nationals resident therein.

There is, it may be admitted, a further most unfortunate lack of clearness as to the result of the present exercise of the treaty power. When a Dominion makes a treaty regarding its relations with another State, does any responsibility rest with the United Kingdom with regard to that treaty? If it is violated by a Dominion, can the foreign State ask the Imperial Government to put pressure on the Dominion to comply with its terms? Or can it at least insist that the British Government shall induce the Dominion to allow the issue to go to arbitration or to decision by the Permanent Court? What would be the position if a Dominion gave to another State a just *casus belli*? These and other questions are quite insoluble as matters of theory. It may be anticipated that they

[1] Parliamentary Paper, Cmd. 3254.

will not arise in practice at any date which can be foreseen, and that speculation as to them is needless.

The issue, however, has been discussed whether a Dominion, *e.g.* Canada, could formally recognise the U.S.S.R. at a time when the British Government refused recognition. The answer seems to be that there is nothing to prevent such partial recognition, which, however, would not bind the United Kingdom or the other Dominions. If this is so, the fact illustrates once more the different extent of the authority which, in international affairs, appertains to the Imperial Government and the Government of any Dominion. For it can hardly be supposed that the grant of recognition by the Imperial Government in the name of the King, if not limited, could be deemed not to apply to the whole of the Empire, even when the recognition is not made part of a treaty transaction. There can be very little doubt that the recognition by the Labour Government in 1924 of the U.S.S.R. as a Government *de iure* was binding on the whole of the Empire, being expressed in general terms, and that it was believed to have this effect is sufficiently established by the fact that the Prime Minister of the Commonwealth of Australia took strong exception to action being taken on such an issue without consultation with the Dominions, and received an assurance that there would be no repetition of such an incident. There may, however, be set against this fact the attitude of Canada, which intimated separately to the Russian representative there, on March 24, 1924, its recognition of the Russian Government. Similarly, when in 1927 the British Government terminated diplomatic relations with the U.S.S.R., and also the Trade Agreement of 1921, like

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action was independently taken by the Canadian Government.[1] What is clear is that there are very cogent reasons why the Governments of the Empire should endeavour to concert action on the issues, and not present a condition of affairs in which one part would continue in diplomatic relations with a foreign State while another part had severed such connexions.

II. *General Conventions*

It was in connexion with General Conventions, the outcome of International Conferences, that the Dominions, as we have seen, first obtained recognition of their individual position, and this position was consolidated by the procedure adopted in the signature and ratification of the treaties of peace, and in the creation of the League of Nations. But the treaties of peace were never ratified by the United States, and thus that Power was not compelled in any way to recognise the new status of the Dominions, nor, in the first instance, was it at all anxious to concede such recognition. The reason was simple enough; one of the chief reasons alleged against the acceptance by the United States of the League Covenant was the fact that it accorded distinct places to each of the Dominions, and the popular view in America was that by this device the British Empire was obtaining six votes, all to be cast in the same way, to the detriment of the United States. It would, therefore, have been inconsistent to admit forthwith the distinct existence of the Dominions, and, as in the case of the League of

[1] Not apparently without doubts as to its necessity, *The Round Table*, xvii. 811, 812.

Nations itself, the United States Government for a time proceeded on the basis that there had been no change in the *status quo*. Accordingly, when the President, in 1921, issued invitations to the Disarmament Conference at Washington, no distinct invitations were addressed to the Dominions as such, and a position of some delicacy arose. General Smuts strongly objected to the position and was anxious to suggest abstention on the part of the Dominions unless their status was recognised, and, obviously, if Canada had accepted this view, the Conference would have been seriously hampered. It was, however, wisely held by Sir R. Borden, who was invited to represent the Dominion's interests at the Conference, that the Dominions should overlook the omission in view of the great international importance of the Conference and the unwisdom of the refusal of any Dominion to accord support. The British Government did its best to facilitate co-operation, for after it had suggested that there should be only one single British Empire delegation, it agreed to appoint distinct representatives for the Dominions, acting *nominatim* for them. Hence, as in the case of the treaties of peace, separate full powers were issued to the representatives of the Dominions, and even South Africa ultimately consented to fall in with the project, Lord Balfour being appointed as representative for South Africa as well as for the King generally. He signed, accordingly, twice, once without specification and once for the Union, and the treaty was signed for the Dominions other than the Union by their own delegates.

It must, however, be admitted that, while Sir R. Borden is, in a sense, correct in laying down that "there

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was no practical difference between the procedure at Paris and that at Washington", there was a distinct theoretical difference. At Paris the President of the United States recognised, as did the other States, the right of each Dominion to a distinct representation on the same footing as the minor Powers. At Washington this recognition was deliberately withheld, and the whole of the Empire was, in American eyes, represented by one delegation. In point of fact, it is clear that the delegates had to agree, or there could have been no treaties arrived at. Obviously, a system of restriction of naval power which permitted Canada or Australia to build up forces irrespective of the strength of the British forces would have been farcical. The whole of the delegates, therefore, worked together, and as Sir John Salmond, the representative of New Zealand and an able lawyer, asserted, the delegation was in a sense absolutely a unity.

The work of the Conference was dealt with by two committees, the first, on limitation of armaments, which was composed of the delegates of the United States, the British Empire, France, Italy, and Japan, the second, on questions of the Pacific and Far East, in which there also took part representatives of Belgium, China, the Netherlands, and Portugal. All the Dominion delegates served on both committees and attended all Plenary Sessions. Sub-committees were entrusted with the preparation of much of the more important part of the work, and on these, which were restricted to one delegate each, Dominion members several times served. The policy to be adopted was thoroughly worked out in the delegation as a whole, and the result achieved was the outcome of

exchange of views without any domination by the British delegates. In point of fact, one of the most important aspects of the question arose from the needs of the Dominions. The Anglo-Japanese alliance had proved of the utmost value to the British Empire, and had been renewed in 1911 with the express approval of the Imperial Conference. But, when it fell to be renewed, there was strong opposition in Canada, and in a less degree in Australasia and the Union. The reasons animating Canada were obvious, and were largely the outcome of the sentiment on the subject of the United States, coupled with the ever-present objection of British Columbia to the presence there of the valuable Japanese elements of the population. Canada was not prepared to accept renewal, because that would antagonise the United States as well as create an uncomfortable state of feeling at home, and the issue to be faced was how to replace the treaty by an instrument which would be satisfactory to Japan, and would show that the British Empire recognised the loyalty of Japan in the war. The formula was the outcome of conversations between Mr. Hughes, the Secretary of State, M. Briand for France, Baron Kato for Japan, and Lord Balfour, and took the form of the Quadripartite Treaty of December 13, 1921. The base of the new accord was the undertaking by the four great Powers to respect their relative rights to insular possessions and dominions in the region of the Pacific Ocean, to determine, if possible, by joint conference any question involving such rights which had not been satisfactorily settled by diplomacy and which might affect their harmonious accord, and, in case such rights should be threatened by the aggressive action of any

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other Power, to communicate fully and frankly with one another as to measures to meet the resulting exigencies. The duration was fixed at ten years, with provision for subsequent denunciation at one year's notice, and for a further consideration of the position which would result from denunciation. On the coming into force of the treaty the Anglo-Japanese alliance came to an end, thus relieving the position of the Dominions from an embarrassment, without seriously arousing Japanese resentment. The Dominions, as well as the British delegates, also aided by their sympathy the efforts finally successful of China to obtain from Japan the retrocession of the territory of Kiao-chau which had been relinquished by Germany under the Treaty of Peace.

The success at Washington was followed by an incident which caused legitimate and deep dissatisfaction in the Dominions, and illustrated in an unfortunate manner the reluctance of France to accept the full implications of the new position. It appears clear that, when it became possible to enter into negotiations with Turkey for the conclusion of peace, after the firm stand of the British Government at Chanaq had proved that Turkey could gain nothing by intransigence, France raised objections to the separate representation of the Dominions at the Peace Conference. Representation of the Dominions could only be conceded if Algeria, West Africa, and Tunisia were accorded representation, although these territories have no voice in moulding French foreign policy and have nothing similar to Dominion autonomy. The British Government, however, yielded. It may have been influenced by various considerations, in addition

to the objections of France. The failure of Canada to support the British at Chanaq doubtless rankled, and, what was more to the point, the fact that the Dominions had been exempted from the automatic application of the burden proposed to be assumed by the United Kingdom to guarantee aid to France along with the United States may have been held to indicate that the Dominions were only in a remote degree concerned with European issues. At any rate, the decision intimated to the Dominions on October 27, 1922, was merely to the effect that arrangements had been made for a Conference at Lausanne to be attended by the delegates of the British, French, Italian, Japanese, Greek, Turkish, Rumanian, Yugoslav, and, for questions affecting the Straits, of the Bulgarian and Soviet, Governments, while the United States was being sounded as to the despatch of an observer. Each Government was to be represented by two plenipotentiaries, of whom Lord Curzon would be one and the British High Commissioner at Constantinople another. The Dominions would be kept informed of the general lines of policy which the British delegates would follow, and of the course of the negotiations, and would be asked to sign any new treaty and the instrument regulating the position of the Straits. The Prime Minister of Canada on October 31 replied in terms which perhaps were not clearly understood by the British Government. No exception was taken to the course to be pursued, but this statement was qualified by a clear warning that "the extent to which Canada may be held to be bound by the proceedings of the Conference, or by the provisions of the treaty or any other instrument arising out of the same is neces-

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sarily a matter for the Parliament of Canada to decide, and that the rights and powers of our Parliament in these particulars must not be held to be affected by implication or otherwise in virtue of information with which our Government may be supplied". An exchange of telegrams followed, from which the Canadian Government unquestionably emerges with the greater credit. The British Government insisted on the suggestion that the procedure adopted was in substance the same as at Versailles, but the fundamental difference was excellently stressed by Canada. In that case there had been the issue of full powers at the request of the Canadian Government to its own plenipotentiaries to sign, "for and in the name of His Majesty the King in respect of the Dominion of Canada", any treaties arising out of the proceedings at which Canada was duly represented, and in which these representatives took part; secondly, signature under these powers by the Canadian delegates; thirdly, approval by the Dominion Parliament of the treaties thus signed; and fourthly, ratification by the King on the request of the Dominion Government. In the new instance Canada had not been invited to send any delegates, and, therefore, it must be presumed that she was not supposed to have any special interest in the proposed treaty. In these circumstances what action was taken must depend on the Parliament, and Canada did not ask to sign the treaty. The British Government took the hint, and, with the concurrence of the other Dominions, decided to restrict the signature of the treaty to the actual British plenipotentiaries, and Canada acquiesced in June 1923 in this course of procedure.

The issue then arose once more when ratification

was to be expressed. Australia, New Zealand, the Union, and India concurred in ratification without any hesitation, and, accordingly, the request was pressed on the Dominion that it also should accept ratification. The answer was quite firm: Canada had not been asked to be represented in the negotiation; Canada had not signed as a result; Canada could not be expected to give Parliamentary approval to the treaty, nor without such approval could the Canadian Government take any responsibility as to ratification. But "they will not take exception to such course as His Majesty's Government may deem it advisable to recommend".

There was much misunderstanding of the Canadian position, which was widely interpreted as indicating that Canada desired to claim that the treaty did not apply to the Dominion, and that the Government adopted the position, which had been asserted in some quarters after the Peace Conference, that Canada could be bound only by the signature of her own plenipotentiaries. This implication drawn from the mode of signature of the Peace Treaty was clearly mistaken, and was in fact contradicted by the contemporaneous mode of dealing with the treaty under which the United States and the United Kingdom agreed to come to the assistance of France in the event of any unprovoked movement of aggression by Germany. The treaty between the United Kingdom and France was concluded in the usual form between the King-Emperor and the President, and to obviate the inevitable conclusion that the treaty applied to the whole of the Empire it was expressly provided in Article 5 that "the present treaty shall impose no obligation upon

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any of the Dominions of the British Empire unless and until it is approved by the Parliament of the Dominion concerned". The power of the British Government to bind the Dominions in a treaty was thus recognised contemporaneously with its duty not to impose on them any obligations save with their consent. The procedure indicated clearly the essential distinction between the fact that the Empire might be involved in war by the action of the British Government, while, as we have seen, by constitutional usage the Dominions were, and had always been, free to determine to what extent they would take part in such a war.

This was the attitude properly adopted by the Canadian Government as explained by Mr. Mackenzie King in the House of Commons on June 9, 1924. "There is a distinction to be drawn", he said, "between the purely legal and technical position in which this Dominion may be placed and the moral obligations which arise under treaties, depending upon the manner in which such treaties are entered into, upon the parties who are present, and the representative capacities in which they acted while negotiations were proceeding. Legally and technically Canada will be bound by the ratification of this treaty; in other words, speaking internationally, the whole British Empire, in relation to the rest of the world, will stand as one when this treaty is ratified. But as respects the obligations arising out of the treaty itself, speaking of inter-Imperial obligations, this Parliament, if regard is to be had to the representations, which from the outset we have made to the British Government, will in no way be bound by any obligation beyond that which Parliament of its own volition recognises as arising out of the situation.

We have not in the past, we do not now hold the view that Canada as a part of the British Empire will not be legally bound by this treaty when it is ratified, but we do say that the moral obligation resting upon this Parliament and country under this treaty, when it is ratified, will be vastly different to the moral obligation which is imposed upon the country under the Treaty of Versailles, having regard to the different manner in which the whole negotiations were carried on."

No real alternative to the Canadian attitude can be said to have existed. As the British Government pointed out, the Empire was at war technically with Turkey and would remain at war until peace were concluded, and the position if Canada had been exempted from the operation of the treaty would have been absurdly anomalous. Canadians in Turkey and Turks in Canada would have been in countries between which no formal peace had been concluded, and a supplementary peace treaty would have been necessary, which must have contained all the concessions made to Turkey in the Treaty of Lausanne. By entering into such a treaty the Dominion would have become directly liable for the observation of its terms, and it would have been worse off than by acquiescence in the British treaty. By adopting that course of action Canada could repudiate any active obligation under the treaty, though she had to admit the loss of privileges of extra-territoriality which had been formerly enjoyed, and which now vanished save in a most limited degree. The attitude of the other Dominions was less pronounced, because both Australia and New Zealand had a sentimental interest in the conclusion of the treaty which safeguarded the graves of their heroic dead in

the Gallipoli Peninsula, while the Union of South Africa could safely refrain from opposing a treaty under which no active obligation was imposed. The Irish Free State hesitated to concur in ratification, and, when it did so in July 1924, it was made clear that no active obligation of any sort was undertaken and that the Free State was mainly concerned to have the state of war existing between the Empire and Turkey brought to a close.

Despite the warning thus given of the attitude of Canada, the Labour Government, in the preparations made for the London Reparations Conference of July 16 to August 16, 1924, failed to secure due representation on an independent footing for the Dominions at that Conference. The failure was even more striking than in the case of the Treaty of Lausanne, because the latter was negotiated immediately after Canada had shown a marked disinclination to aid in the defence of the British forces in Turkey against a Turkish attack, and, therefore, might be held to have followed the example of the United States in disinteresting herself in European wars. Moreover, whatever may be said of the objections of France, and however they may be ruled to have been unfair, they did exist, and there is no reason to suppose that Lord Curzon encouraged them in any way. Moreover, the situation remained acutely dangerous, and the failure to agree on peace terms might have meant a renewal of war. On the other hand, whatever might be said of the friction in Europe, it is exaggeration to compare the situations in the two cases. If delay had resulted from the British Government standing out for the rights of the Dominions, the responsibility would have lain with the

Powers who objected to the Dominions receiving their due place, and doubtless, if the Labour Government had shown more firmness, the position of the Dominions might have been secured. But the Labour Government had shown immediately on entering office a complete disregard of the Dominions by recognising the Russian Government without consultation, and doubtless in their anxiety for a financial settlement they decided that Dominion views must be treated as of second-rate importance. Accordingly, the suggestion of the British Government to the Dominions was to have only three British representatives at the Conference, who would probably be members of the British Government. Canada emphatically dissented, but the British Government did not yield, and the first plenary meeting on July 16 took place without Dominion representatives. Happily, the untenable position of the British Government was realised, thanks again to the firm but dignified remonstrances of Mr. Mackenzie King, and on July 18 the Colonial Secretary announced the makeshift plan which had been patched up for this occasion, but was not to be treated as a precedent. The separate representation demanded by Canada was not conceded, but the British predominance proposed by the Imperial Government was dropped, and instead the representatives of the Dominions and of India were made members of the British Empire delegation at the Conference on the panel system, and it was arranged for the representatives so appointed to be present at the meetings of the Conference on days when it was not their turn to sit as members of the British Empire delegation, so as to ensure that they were fully acquainted with all that passed at the Conference. The plan was adopted

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by the Dominions, save the Irish Free State, which had not been represented, of course, at the Paris Conference, the arrangements made at which it was now desired to revise. Moreover, the whole body of delegates from the United Kingdom and the Dominions met every day and discussed the whole situation, not as British as opposed to Dominion delegates, but as a united delegation having a common interest. The position thus resembled closely that attained at Washington, but there was a very serious difference between the significance of the two cases. At Washington the invitations issued from the United States, a Power which had refused to ratify the peace treaties because the Dominions were given a distinct status, as well as for other reasons. At London the Powers present had all accepted the distinct existence of the Dominions, and to refuse them in 1924, the treatment accorded in 1919, was a most retrograde and objectionable step, for which it is unsatisfactory to offer excuses.

The Dominions naturally secured on the final conclusion of the London arrangement the right of distinct signature, as had been conceded also at Washington, and unquestionably their interests were so comparatively small in respect of the issues that their acceptance of the makeshift solution was natural enough. But the want of real and effective co-operation was shortly to be seen in the far more vital step which was taken in 1925 to secure European peace by the formal accord by the United Kingdom to France, Belgium, and Germany of a guarantee for their frontiers under the Locarno treaties. The agreement of 1919 with France had been conditional on the acceptance of a like obligation by the United States, and with the

failure of approval by the Senate the matter had disappeared in that shape from the field of practical politics. Effort after effort to resuscitate it had been mooted, but in vain, and its necessity only became evident after the failure of the efforts made in 1924 to induce general agreement at Geneva on the adoption of the Protocol for the Pacific Settlement of International Disputes. The attitude of the Dominions towards that proposal was so absolutely negative in character that the British Government doubtless was driven to realise that no progress could be made on the lines of carrying with it the Dominion Governments in any issues involving the possibility of armed action to maintain security in Europe. Hence the decision to accept sole responsibility for the guarantee given at Locarno. In accordance with this decision the Dominions were not represented at the Locarno negotiations, nor were they asked to sign the treaty of guarantee. But following the precedent of 1919 their position was so far safeguarded by providing that "the present treaty shall impose no obligation upon any of the British Dominions or upon India unless the Government of such Dominion or of India signifies its acceptance thereof". The change made since 1919 was slight; the power to accept was vested in the Government in lieu of the Parliament, but this at first sight serious change really was dictated by the necessity of saving the Government of India from having to obtain the assent of the Indian Legislature. It was most improbable that that body would accept the obligation voluntarily, while to certify the measure necessary to give the pact approval would have been a most unfortunate proceeding. The authority then was given to the Government of India and

the legislature was not given any chance of debating the issue. In the Dominions, of course, no Government in its sane senses would dream of undertaking any obligation without the assent of Parliament, and inevitably no Dominion has deliberately proposed to accept a serious obligation which is not legally essential.

The Dominions, however, were not allowed to escape at the Imperial Conference of 1926 the obligation of expressing some view on the Locarno system. The Conference met just after the ratification of the treaty of mutual guarantee on the entry of Germany into the League of Nations, when it was possible to envisage the results which the Locarno policy had achieved already and to forecast to some extent the further results which it was hoped to secure. These were explained and discussed, and "it became clear from the standpoint of all the Dominions and of India there was complete approval of the manner in which the negotiations had been conducted and brought to so successful a conclusion". The final outcome of this approval was of modest character; it consisted in congratulating the British Government on its share in the contribution towards the promotion of the peace of the world. It is impossible to ignore this formal expression of approval, and it may fairly be said that by committing themselves unanimously to it the Dominions have weakened the moral case if they desire at any later date to withhold active support, in the event of it ever becoming necessary to implement the guarantee. Their freedom from legal obligation is obvious and undeniable, but their recorded approval changes completely the mere moral outlook. Constitutionally, again, the necessity of exempting the Dominions from the scope

of the obligations of the treaty was a significant reminder of the power of the Crown by signature uncoupled with reservations to bind the whole of the Empire.

The position in this respect was distinctly anomalous, and an effort was made to clarify the whole situation by the Imperial Conference of 1926, revising the work which had been tentatively set about in 1923, without securing full settlement. The situation was evidently far more clearly envisaged by the Conference than at any previous time, and a real attempt was made to deal with those cases where treaties were not negotiated by International Conferences under League of Nations auspices, at which, of course, no difficulty could arise. In these instances each Dominion would receive its special invitation. But there remained other proposals for treaty-making by International Conferences, which emanated from individual Powers. In the case of Conferences of a technical character it was agreed that separate representation should be arranged for, and that, where necessary, efforts should be made to secure invitations which rendered such representation possible. It is in point of fact clear that such invitations can always be insisted upon by refusal of any part of the Empire to participate on any other footing. Nor could any foreign Power take just exception to this attitude on the part of the Empire. The position of the Dominions on the League of Nations is an international token of approval by the nations of the world of their right to be treated, as far as possible, as distinct units.

The issue is unquestionably different as regards political treaties, and importance attaches to the mode

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in which the invitation is couched and the possibility of securing such a form of invitation as will render separate representation of the Dominions possible. Moreover, it has to be considered by each Dominion whether its particular interests are so involved, especially with regard to the active obligations likely to be imposed by any resulting treaty, that it desires to be represented at the Conference or is content to leave the negotiation to the parts of the Empire more directly concerned, and to accept the result. If it desires to participate, the method to be adopted must depend on consultation with the other parts of the Empire and on the terms of the invitation. Three methods are possible: (1) The whole of the Empire may be represented by a common plenipotentiary or plenipotentiaries, acting under full powers issued on the advice of all the parts; (2) there may be, as at Washington and at London in 1924, a single British Empire delegation, composed of separate representatives of those parts of the Empire which participate in the Conference; or (3) there may be separate delegations representing each of the Governments participating, provided the invitation can be secured in the necessary shape to allow of this.

The Conference recognised, as was essential, that "certain non-technical treaties should from their nature be concluded in a form which will render them binding on all parts of the Empire, and for this purpose should be ratified with the concurrence of all the Governments. It is for each Government to decide to what extent its concurrence in the ratification will be facilitated by its participation in the conclusion of the treaty, as, for instance, by the appointment of a

common plenipotentiary. Any question as to whether the nature of the treaty is such that its ratification should be concurred in by all parts of the Empire is a matter for discussion and agreement between the Governments."

The system obviously presents many difficulties of application, and it is important to note that there was full recognition of the doctrine that in some matters the Empire cannot be divided up, though there is silence as to the cases to which this principle applies. The Conference, however, evidently approved entirely the mode in which the Locarno Pact was couched, and, therefore, it must be taken as accepting the position that it is possible for the United Kingdom to enter upon an agreement the result of which might be war, although the Dominions have not been represented at its negotiation nor have accepted it in any form, provided always that the agreement imposes no positive duties on the Dominions. As in that case, so in the future, under the Conference agreement, it will be possible for the Imperial Government to undertake engagements indirectly, though vitally, affecting the whole of the Empire. It is, therefore, interesting to remember how vehement were at one time the objections of Dominion statesmen to the power of the Imperial Government to involve the Dominions in war without their assent. "The great policies and questions which concern and govern the issues of peace and war cannot in future be decided by the people of the British Islands alone," said Sir R. Borden in December 1915. Mr. Hughes on June 24, 1916, was emphatic in the declaration that if the United Kingdom had the power to involve by her action the Dominions in war, she was

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in effect depriving them of a measure of self-government, compelling them to alter their domestic policy and raise enormous masses of taxation. Mr. Massey and Sir J. Ward added their voices to the chorus, "There must be a change". But these statesmen did not fully appreciate that power involves responsibility; if the Dominions are not prepared to share the latter, they cannot finally control the issues of war and peace. The United Kingdom has a position in Europe which prevents any attempt at the isolation dear to Canada and even to Australasia, and the Conference was not prepared to ignore the essential fact that there must be left to the Imperial Government a measure of treaty power which in exercise would impose at least passive obligations on the Dominions. The decision was unavoidable. If the Dominions had insisted that in no case could a treaty bind the whole Empire without the express assent of the whole of the Empire, the result would have been equivalent to a decision to break up the unity of the Empire, for it would have rendered such a pact as that of Locarno an impossibility for the future, and thrown doubt on its effect in practice.

Where a pact must be accepted as binding passively the whole Empire, or where active obligations for all parts are contemplated, it seems clear that the second or third mode of procedure suggested is the appropriate one. Either mode provides that the unity of the Empire is secured together with the formal expression in the signature of the compact of the diversity and autonomy of its parts. From the Imperial point of view, it would be infinitely preferable that, for instance, a treaty of guarantee were signed separately for the Dominions by their plenipotentiaries than if it were signed merely

by common plenipotentiaries, whose authority as speaking for the several parts of the Empire could not appear at all on the face of the signatures. In such a case the third form of procedure has perhaps no special meaning once it is agreed that the decision must be one for the whole Empire; its real use lies in cases where, however important the treaty may be, there is clear room for holding that it can be accepted for part only of the Empire.

Nevertheless, at the International Conference on Naval Disarmament held at Geneva from June 20 to August 4, 1927, the mode of procedure adopted was the third of the methods suggested, each part of the Empire represented being specially invited and sending its own delegation to sit with those of the United States and Japan. Had any agreement been reached, of course, it must have been the result of common agreement, and virtually the same result would have been achieved if the delegation had been regarded as a single British delegation. In effect, therefore, the only distinction between the procedure at Washington and the new procedure was in the sending of distinct invitations, and in the fact that the delegations were not formally a unity. In so far as these points emphasise the distinct personality within the Empire of the Dominions, there is no reason to take exception to them, and it is probable that in future this form of representation may come to be normal as opposed to the second form, but for essential purposes it is clear that the two are identic, and that both are superior to the first.

The deliberations of the Conference of Geneva[1]

[1] Parliamentary Paper, Cmd. 2964.

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broke down on the inability of the United Kingdom and the United States to agree on a formula which would permit of the British Empire maintaining an effective force of cruisers to safeguard the sea-routes of the Empire, while not resulting in the acquisition by the United States of a force in large cruisers which would constitute the American fleet by far the most formidable weapon of offence still existing in the world. The failure was followed in 1928 by a well-meant but not very effective effort of the United Kingdom to agree with France[1] on a formula which would permit of the removing of the differences between these Powers on naval disarmament and reduction of land armament. The compromise resulted ultimately in a complete failure, for it was wholly unacceptable to other great Powers, and was unpopular in the United Kingdom because of the serious concession which it was intended to make to France regarding the reckoning of reservists in counting up military power. But from the point of view of the Dominions there was criticism in Canada of the procedure adopted. The British Government had sounded the Dominions as to their views on the project, but it had not elicited any expressions of much interest, and the actual result of the Conference with France was conveyed to Canada only after it had already reached several foreign Powers.[2] The whole episode can best be explained by a misunderstanding on the part of the British Government of the true obligation attaching to it under the understandings reached in 1926. It is clear that the obligation should have been

[1] Parliamentary Paper, Cmd. 3211.

[2] Mr. Mackenzie King, House of Commons, February 20, 1929.

understood to be one of keeping the Dominions continuously informed of the process of negotiation, leaving them free to suggest matters requiring special attention from the Dominion point of view. The British Government, however, evidently considered that it was sufficient if the Dominions were given at the outset information of their plans, and then left without further intimation when they failed to express any special interest. It must also be remembered that the negotiations with France were not in the strict sense intended to result in a treaty, but were merely planned to secure an accord between the two Powers which would enable them to aid under the League auspices in the elaboration of a scheme of reduction of armaments. But, on the other hand, the interest in the issue of reduction of armaments of the Dominions is obvious, and clearly they stood to be affected by any British decision, so that steps to secure more active co-operation would have been desirable. Nevertheless, allowance must be made for the obvious fact that, as Canada has definitely abandoned any idea of creating a naval force, the Dominion Government could not effectively intervene to hamper any agreement which might help the British Government to lessen the burden imposed on the British tax-payer by the weight of armaments in Europe, and some failure to insist on full consultation is explicable if unfortunate.

Matters, fortunately, were better arranged in the affair of the conclusion of the Pact for the Renunciation of War in 1928.[1] The first impulse to this pact was given by the French proposal, arising out of the renewal of the Arbitration Treaty between the two countries, to

[1] Wheaton, *International Law* (6th ed.), i. 607-611.

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include a renunciation of war as possible between the United States and France. The happy idea of extending the proposal to a general pact gave distinction to the work of Mr. Kellogg as Secretary of State and of Mr. Calvin Coolidge as President. The British Government used its best efforts to reconcile the divergences of view which appeared between the French and the United States Governments as to the precise form which a general treaty might usefully take, and in a note of May 19, 1928, Sir A. Chamberlain laid down certain principles of great importance as embodying the understanding on which the British Government would enter into the treaty. He stressed the fact that nothing in the pact to renounce war must be understood to weaken in any way the obligations imposed by the Covenant of the League of Nations or the Locarno Pact. Moreover, he enunciated a Monroe Doctrine for the British Empire: "There are certain regions of the world, the welfare and integrity of which constitute a special and vital interest for our peace and safety. His Majesty's Government have been at pains to make it clear in the past that interference with these regions cannot be suffered. Their protection against attack is to the British Empire a measure of self-defence. It must be clearly understood that His Majesty's Government in Great Britain accept the new treaty on the distinct understanding that it does not prejudice their freedom of action in this respect. The Government of the United States have comparable interests, any disregard of which by a foreign Power they have declared they would regard as an unfriendly act. His Majesty's Government believe, therefore, that in defining their position they are expressing the in-

tention and meaning of the United States Government." These reserves were in effect acknowledged as just by Mr. Kellogg in an address to the American Society of International Law of April 28, 1928, and in a note to the British Government of June 23, but they were not formally embodied in the treaty, and, therefore, are not binding on any signatory Power unless they are in fact the just interpretation of the treaty, for the British views were not even communicated to the Powers invited to sign by the United States Government. Among others the Russian and the Egyptian Governments have naturally emphasised their refusal to accept the reservations as binding. A more precise definition of the regions affected by the British counterpart of the Monroe Doctrine was declined in the House of Commons, but its immediate application to Egypt, Iraq, and the Persian Gulf is obvious.

From the point of view of the Dominions, great importance attaches to the fact that, while the United States *démarche* was addressed to the Imperial Government alone, the British Government made a point of consulting the Dominions before it returned its reply, though it is essential to note that the concurrence of the Dominions in the British reservations was not obtained. Further, it was intimated by Sir A. Chamberlain in his note of May 19, that "the proposed treaty, from its very nature, is not one which concerns His Majesty's Government in Great Britain alone, but is one in which they could not undertake to participate otherwise than jointly and simultaneously with His Majesty's Governments in the Dominions, and with the Government of India". It was, therefore, suggested that they should be invited to participate in the conclusion of the treaty,

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and the suggestion was wisely and unhesitatingly accepted by the United States Government. The procedure followed was that of addressing requests for participation direct to the Irish and Canadian Governments, with which the United States had direct diplomatic relations, and through the Imperial Government to the other Dominions. Moreover, the form of the treaty was recast in order that it might be concluded in the name of the King-Emperor, and signed separately by plenipotentiaries for the Dominions and India, and the signatures were so appended. Ratifications followed in the same manner, the treaty being ratified simultaneously by the King for all the parts of the Empire after advice to this effect had been tendered by all the Dominions and India, as well as by the British Government. No more effective signification of Imperial agreement could well be imagined as far as concerns the actual treaty.

It must at the same time be noted that the Dominions did not expressly adopt the reservations of the British Government, and are not bound by them, the Governments of Canada and the Irish Free State as well as that of the Union being careful in their declarations to their Parliaments to make it obvious that they did not consider themselves to be concerned by the explanations tendered by the British Government. The position is decidedly anomalous, and raises a possible issue in connexion with the question of the neutrality of the Dominions in British wars.[1]

It must further be noted that Mr. Mackenzie King expressed himself in the Canadian House of Commons on May 18, 1928, in the sense that despite the nature

[1] See Chap. XXI.

of the treaty it was open to the British Government to accept it without obtaining the concurrence of the Dominion. No doubt he assumed in thus stating the position that, if thus accepted by the British Government, it would not have been made applicable to any of the Dominions without their assent, or that, as the power to make war does not belong to a Dominion, it was unnecessary for the Dominion to be formally concerned with the treaty. The latter consideration is, of course, clearly valid, but the concurrence of the Dominions is of the utmost value as signifying that the policy of renouncing war has the complete and unfeigned support of the whole of the Empire. It is, it may be observed, impossible to base on the separate signatures the right of the Dominions to make war; on the contrary, the British Government made it clear that in this instance there was a case in which there could be but one policy for all the territories under the Imperial Crown.

III. *Parliamentary Assent to Ratification*

One essential feature of the development of the sovereignty of the Dominions has been the insistence on the view that all treaties of any importance shall be ratified only after approval by Parliament. This doctrine was first, as has been seen, applied under the procedure followed as regards commercial treaties negotiated for the colonies, and it served as an assurance to the British Government that, when a treaty had been ratified on behalf of the Crown, there would not arise any difficulty in carrying out its terms, a breach of which might afford the basis of a diplomatic claim.

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Under the new régime the importance of ratification after Parliamentary approval is that Dominion Governments are freed from the grave responsibility which would rest with them if they advised the King to ratify, while they had not the assurance of effective support by Parliament. Hence the procedure was adopted in all the Dominions in respect of the peace treaties, though it was not always applied to the minor treaties arising out of the peace settlement, even when signed for the Dominions by their plenipotentiaries. To the omission of this formal consultation of Parliament in any case exception was taken by Mr. Mackenzie King, and the latest practice in Canada is that all treaties should be ratified only after they have been approved by Parliament. The British practice was in 1924 assimilated to this, but the fall of the Labour Government resulted in a reversion to the plan of allowing the Government to use its discretion. This is natural in the case of the United Kingdom, for it concludes a number of minor treaties affecting colonial boundaries and so forth which are not worth while laying before Parliament for formal sanction, while in the Dominions practically all the treaties concluded have some more or less immediate interest for the Dominion. Hence in 1928 the Canadian Parliament was asked to approve the ratification of a large number of Conventions, including the Geneva Opium and Slavery Conventions, and the International Sanitary Convention of 1926. It also passed in June three Acts, one of which made applicable to Canada the treaties with Spain of 1922–7 concluded by the Imperial Government, one the Convention of 1928 with Czechoslovakia, signed by Canadian plenipotentiaries, and one secured for Canada

the advantage of most favoured nation treatment authorised by the Imperial treaties with Latvia, Lithuania, Estonia, Portugal, Rumania, and the Serb-Croat-Slovene Kingdom, so long as Canada granted these countries like treatment. The Government also insisted that it must have Parliamentary authority for the ratification of the Pact to Renounce War.

The transfer of power to conclude treaties[1] to Canada has not, however, removed all difficulties, for the constitutional issue has been raised in the Dominion how far the federal Parliament can bind the provinces by legislation to carry out treaties. The authority of the Dominion Parliament and Government was extended by Section 132 of the British North American Act to include "all powers necessary or proper for performing the obligations of Canada, or of any province thereof, as part of the British Empire, towards foreign countries arising under treaties between the Empire and such foreign countries". Can the federal Parliament under this power, by negotiation of a treaty by the federal Government in matters which are assigned by the Constitution to the provinces, obtain the right to overrule provincial laws? The Spanish Treaty, for instance, dealt with succession duties and a Convention of 1924 secured national treatment for Spanish companies. Thus the acceptance of these agreements by the Dominion legislation curbed the power of the provinces to deal with these issues. There was inevitably controversy as to whether such legislation was not invalid. Could the Dominion Government by treaty

[1] *E.g.* with Belgium in 1924, with the Netherlands in 1924, and frequently with the United States, *e.g.* on March 27, 1929, as to the salmon fisheries on the Fraser River.

confer on the federation powers contrary to the essential Constitution, which Parliament had no direct power to modify in a single particular as regards the division of federal and provincial power? Was a treaty negotiated by Canada and signed for Canada alone a treaty between the Empire and a foreign country? It seems fairly clear that any treaty negotiated for the King, even if applicable only to Canada, is an Imperial treaty, if the treaty is concluded under full powers issued under the great seal of the realm, and ratified in like manner. But it is most improbable that the Privy Council would admit the right of the federation vitally to alter the Constitution by usurping powers under the device of treaty negotiation.[1] It would, on the other hand, doubtless admit that in such minor issues as those above mentioned the provinces might be legitimately hampered in their action by federal treaties. The issue, of course, in such instances is minimal, but the matter is in one sense of fundamental importance because of the issues as to the development of power on the St. Lawrence River and its deepening and development for navigation.[2] Could Canada by a treaty with the United States claim for the federation power of legislation against the proprietorial right in the waters and bed of the river claimed by the provinces? The failure of the reference made by consent to the Supreme Court to elucidate the issues has necessarily led to the effort to arrange by agreement between federation and the provinces for conjoint action to dispose of the issue.

The fact, however, that so much power rests with

[1] Keith, *Journal of Comparative Legislation*, 1929, pp. 121-5.
[2] *The Round Table*, xviii. 623-30, 832-57.

the provinces has effectively prevented any serious efforts by Canada to ratify the Conventions arrived at by the deliberations of the Labour Organisation of the League of Nations. It has been authoritatively laid down that the duty of Canada under the treaty provisions in the Labour chapters of the peace settlement is to submit the Convention on Labour issues to the provincial authorities for consideration. The result has inevitably been negative, but the alternative of overriding under the treaty power the provincial laws would doubtless have been a failure. It is most improbable that, even had Canada sought to exercise the power, it would have been upheld by the Privy Council, for it is clear that the Constitution reserves to the federation no control over labour in general, granting the essential power of regulation to the provinces alone.

In the Commonwealth of Australia also the rule of legislative approval before ratification is observed, though with much less insistence on the constitutional aspect than in Canada. The division of power in that federation between the federation and the States includes no general authority to override, in order to carry out treaties, the powers of the States, and accordingly, the federation does not seek to bind Australia save in so far as the States are in agreement. This inevitably sets a very narrow limit to treaty-making activity by the Commonwealth beyond the bounds of agreements as to customs tariffs. In matters of high policy authority may be safely assumed to rest in the Commonwealth by reason of its power to deal with external affairs. Thus the Washington treaties were duly confirmed by an Act of 1922, as had been the settlements with Germany, Austria, etc. In New Zealand

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and the Union of South Africa, in like manner, the sanction of Parliament has been given by act or resolution to the necessary conventions and agreements accepted by these Dominions, and on February 22, 1929, the Dail authorised the ratification of the Pact to Renounce War of August 27, 1928.

A curious point arises as to the position of the Dominions when a treaty is concluded under the modern procedure by the United Kingdom, and not being accepted for a Dominion is not ratified for that territory. It will clearly be necessary for care to be taken in the legislation passed by the Imperial Parliament to exclude any possibility of extra-territorial operation. Under the older procedure, as seen in the Treaty of Lausanne, the legislation passed to give effect to the treaty was necessarily unlimited in extent, since the treaty applied to the whole Empire by necessity, and it is clear[1] that incidentally the Imperial Parliament exercised its supreme legislative authority in 1924. The Act itself is unlimited in scope and empowers the Crown to carry out all the terms of the treaty, which includes certain specific clauses affecting the law of the Dominions. Article 65 of the treaty provides for the immediate return to the owners of the property, rights, and interests of Turkish nationals in British territory which existed on October 29, 1914, and which can be identified. Article 79 provides that periods of prescription or right of action shall be treated as having been suspended as between enemies until three months after the coming into force of the treaty. It is, of course, clear that it is most unfortunate that Imperial

[1] Corbett and Smith, *Canada and World Politics*, pp. 95, 96. The law applied also in this way to the Irish Free State.

legislation should have been necessary in this way, but it may fairly be assumed that it was not considered likely that any difficulty would arise in the Dominions under the treaty, and accordingly it was not felt worth while passing special legislation to meet so insignificant a case.

CHAPTER XIX

THE NEGATION OF PERSONAL UNION

THE idea that the Imperial Conference of 1926 resolved the Empire into a number of distinct independent States, united merely by the possession of a single Sovereign, was freely expressed even in England immediately after the issue of the report, and, though this view was normally modified on further consideration, it has naturally often been accepted by foreign authorities. It is true that this view has the support of the general language used in the report. If the Dominions were not subordinate to the United Kingdom either in domestic or in external affairs, and were merely associated by common allegiance and by voluntary membership of the British Commonwealth of Nations, it seemed at first sight fair to say that the relations between the parts of the Empire are essentially those of a personal union comparable with that between Hanover and the United Kingdom. It did not apparently occur to the exponents of this theory that the mode chosen for the complete disintegration of the Empire was the most curious possible. Such a remarkable event would at least have normally been carried out by a constitutional convention whose deliberations would have been formal and public, whereas the business of the Conference was carried on in secret and

was settled by a number of Prime Ministers, not one of whom had taken the precaution to explain his purpose to his Parliament and obtain its sanction for revolutionary action. Moreover, the treatment of the report hardly bore out the theory of its fundamental importance. The British Government was unable to find time for any discussion of it for months, and even then did not propose a formal resolution approving the report. Indeed, it seems clear that it was the energy of a constitutional expert, Sir John Marriott, which alone elicited any serious contemplation of the terms of the document by the House of Commons. In Canada, the Government deliberately refused to ask Parliament to sanction the report taken as a whole; its fate was even less respectful in Australia, which merely, on May 4, 1928, approved its being printed, and New Zealand, where it was never approved in any form, and only in the Union was it deliberately accepted. Even there the debate revealed a fundamental discrepancy of view as to the implications of the report, and General Smuts and his supporters voted for their interpretation, not for the more radical conception of the Prime Minister.

It is clear, therefore, that the report was not deemed by the great Governments of the Empire to bring about any fundamental change. But, if any doubt existed, it would be removed by the fact that the Imperial Government pointedly refrained from any communication to foreign Powers of the report or of the results of the Conference. There was only one manner[1] in which a vital change of Imperial relations could properly be intimated, namely, a formal note from the British Govern-

[1] General Hertzog expressly asked for such action at the opening of the Conference.

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ment to foreign States intimating the dissolution of the existing unity, and the substitution of a plurality of States subject to one Sovereign. It is easy to picture the reception which would have awaited any of the Prime Ministers of Canada, Australia, New Zealand, or Newfoundland who had returned home to announce that this was the outcome of his visit to London. The Dutch population of the Union might have welcomed the result, but certainly not the British, and the Irish Republicans would very pertinently have enquired what useful purpose was served by preserving a nominal union; if the Free State delegates could secure the abandonment of all real connexion, then they should have gone further and terminated even a formal connexion.

It must, therefore, be taken as certain that the desire of the Conference to preserve unity was effectively carried out under the system which they recommended for operation. Nor in fact is there any doubt that this is the case. The obvious sign of an independent State is the uncontrolled power of treaty negotiations, and this was not asked for by the Dominions or conceded by the Conference. The whole trend of the resolutions of the Conference was in the direction of greater, not less unity and co-operation. The arrangements as to treaties of 1923 had left a serious possibility of failure of co-operation. It was left to each Government which proposed to negotiate to decide for itself whether the interests of any other part of the Empire were likely to be affected, and, if it did not hold this view, however erroneous its opinions might be, it was entitled under the Conference resolutions of 1923 to proceed regardless of other Governments. When the Conference

of 1926 considered the issue, the mistake was detected and rectified by compelling intimation of intention to negotiate to all the other Governments of the Empire. Moreover, the new rôle is of special value because of the establishment of the diplomatic representation of the Dominions in foreign countries. Had the rule of 1923 stood unaltered, it would have been perfectly legitimate for the Canadian Government to open up negotiations with Washington without troubling to consult the other Empire Governments, so long as it believed that their interests were unaffected, and, without any deliberate failure of consideration for other Governments, it is perfectly obvious that errors must have occurred.

Great importance attaches further to the decision to maintain and extend the rule of the signature of conventions in the name of the King as representing the whole Empire, with specification of the part of the Empire specially affected. There is in this technical arrangement a vital distinction between the state of affairs under a personal union of Kingdoms and the condition of affairs in the British Empire. Had a personal union been created, the King would have contracted[1] with foreign Powers in his capacity, *e.g.* as King of Canada or of the Union of South Africa and so forth, but this was not proposed by the Conference. Moreover, if this had been arranged, it would have been accompanied by the omission of the fundamental feature of the present treaty procedure. That involves the grant of full powers under the Royal signature, and the ratification of treaties by the King, with the use of the great seal of the realm, not a Dominion seal. In both

[1] Corbett and Smith, *Canada and World Policy*, pp. 138-40.

these matters the Governor-General does not act; he possesses no delegation of the treaty power from the Crown, and, as a result, the instruments of treaty negotiation and conclusion are issued with the King's sign manual. But the sign manual is affixed solely on the recommendation of Ministers, for no act of State can be performed, according to the modern usage, by the King, without ministerial responsibility. As the Royal Commission on Honours pointed out,[1] even if His Majesty should desire to confer a peerage on a member of the Royal family, the responsibility for the appointment must rest on the Prime Minister by whom it would be duly recommended to the Crown.

Granting, however, that it is necessary that action by the King should be based on the authority of Ministers, it may be asked whether the authority is not that of Dominion Ministers. The first answer to this enquiry is simply based on fact. The full powers and instruments of ratification which are issued are not Canadian or Dominion instruments under the seals of Canada or any other Dominion; they are issued under the seal of the realm, and the seal of the realm cannot be affixed save under the authority of a sign manual warrant which is duly countersigned by a British Minister, the Foreign Secretary. For a Dominion Minister to advise the issue of a document under the seal of the realm would be as illegal and improper as it would be for a British Minister to advise the affixing of the seal of Canada or any other Dominion.[2] The established procedure, therefore, imperatively demands the

[1] Parliamentary Paper, Cmd. 1789, p. 5.

[2] The countersignature of a Dominion Minister to a consular exequatur (see p. 451 *post*) is wholly different. This is a special concession on a very minor issue of no Imperial interest.

intervention of a British Minister, and due adherence to it was definitely recommended by the Imperial Conference.

The second question, therefore, must be, Is the intervention of the British Minister purely formal, so that the advice is really that of the Dominion Ministry? Now it is perfectly true that in a very vital—the most essential—sense "the full power issued by the King authorising a recipient to sign a treaty on behalf of any particular part of the Empire is issued on the advice of the Government responsible for that part". This is indeed, and has long been, the fundamental principle observed; it was true of Sir Charles Tupper's appointment in 1893 to sign the treaty with France as to Canadian trade, and not a single appointment of a Dominion representative to sign a treaty has ever been made without the formal approval of the Dominion Government concerned. There is no doubt, therefore, regarding the fact that the Dominion Ministers advise, or that but for their advice no idea of making any appointment would ever arise. Nor again is it doubtful that the responsibility which they assume for their action is a very real one. They must answer to their Parliaments for the advice which they tender, whether it be in the shape of an Order in Council advising the appointment of delegates to sign treaties or the ratification by the Crown of such treaties.

But this is far from concluding the matter. What is the position of the Secretary of State for Foreign Affairs when he secures the Royal sign manual to the warrants authorising the affixing of the seal of the realm to the instruments, whether full powers or ratifications? Can he allege that he is merely a mechanical

agency through whose hands for some unexplained reason the documents must pass, and whose signature is automatically affixed? The answer is clearly in the negative. The most serious attempt to justify this view of his position is that of Professor Jennings,[1] whose doctrine is that the Secretary of State is but an intermediary, who cannot form any personal opinion for which he can be held responsible to Parliament. He is merely furnished with the documents under a convenient arrangement so that he may call the attention of the Government negotiating to the fact that some other part of the Empire may be affected by the treaty in question. It is frankly impossible not to regard such a doctrine as self-contradictory. If it is the privilege of the Secretary of State to call the attention of the Dominion Government to its neglect of the interests of the other parts of the Empire, it is clear that he has a duty to perform this task, and a Minister of the Crown, if he has a duty of this kind, is responsible to the House of Commons for its due execution. The theory that the Secretary of State might be a mere post box is conceivable, though it would be ridiculous thus to employ so high a Minister, but it is impossible to hold that he is to perform that humble function and at the same time delay the delivery of the Dominion missive by suggesting that it should not have been sent.

The matter becomes perfectly plain when expressed in concrete terms. If Newfoundland, which is extremely anxious for a reciprocity treaty with the United States, were to desire to conclude with that Power a treaty

[1] *Revue de droit international*, viii. 397. See Keith, *Canadian Historical Review*, ix. 102-16.

which gave to American imports a clear preference over Canadian imports into the island, and secured for Newfoundland exports specially favourable terms which might work serious injury to Canadian fishermen, it is impossible to suppose that the Secretary of State for Foreign Affairs could issue full powers to negotiate and arrange the ratification of such a treaty and then assert that he acted mechanically. It would at once be asserted that he owed a duty to the Empire to withhold action until the assent of Canada were attained, or until the issues were laid before an Imperial Conference and the whole matter were thoroughly examined. This restriction on Dominion autonomy is essentially involved in the maintenance of the present form of procedure, and it cannot be regarded as objectionable by any part of the Empire which values unity. The essence of the report of the Conference of 1926 is the maintenance of unity at the same time as the development of autonomy,[1] and no Dominion can consistently say that it will decline to delay action pending the considered opinion of the other parts of the Empire being invited and obtained. What the ultimate action in any case might be, would clearly depend on the circumstances; in the case imagined, if the Imperial Conference or the Dominion Governments when consulted declared themselves against the Newfoundland proposal, it may be presumed that either the Newfoundland Government would withdraw its advice regarding the proposed treaty or that the British Government would withhold the necessary instruments. But there is no reason to

[1] See Mr. Bruce, Commonwealth House of Representatives, March 3, 1927.

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imagine that the Empire is so devoid of statesmanship as to bring matters to a deadlock.

The nature of the Imperial action in such cases is sufficiently illustrated by the episode of 1928–9 regarding the commercial treaty concluded by the Union of South Africa with the German Government. The treaty was a great achievement for German diplomacy, for, despite the comparatively ungenerous treatment accorded to Union exports in Germany, the Union Government conceded to Germany, among other privileges, the absolute right to receive the benefit of any further preferences granted to any other territory including the United Kingdom itself. The action in question was in a sense notified in advance, when in 1925 the Government of General Hertzog recast its tariff policy, for it was then given power to negotiate treaties on the basis that the British preferences then accorded were not to be conceded, but without any restriction on conceding in future to foreign countries treatment on the same footing in other matters as the United Kingdom. The Government's action was naturally challenged freely by the Opposition and its wisdom was doubted by many who did not on general grounds sympathise deeply with the Opposition standpoint. As good business men, these critics felt that Germany had, by the skill of her diplomats and the lack of it on the part of the amateur diplomats of the Union, made a very one-sided bargain and that, assuming the Union were to be prepared to make sacrifices at the expense of the United Kingdom, they should at least have been more generously recompensed by the German Government. Political considerations doubtless in part weighed with the Union

Government. The Boers have never forgotten the fact that at one time they pinned their faith in the aid of Germany against the United Kingdom, or that Germany aided the rebels in 1914–15. There has, therefore, always been a certain tendency to seek in Germany a support against the United Kingdom, and this movement has been strengthened by the issue of South-West Africa. General Smuts was able in 1923 to secure by personal negotiations in Germany the assent of the German Government to the wholesale transformation of the German residents there into British subjects in the Union, provided they agreed, and the concession of a generous measure of self-government, as well as the adoption of a native policy not much less rigorous than that of the pre-war German régime, has greatly tended to reconcile the inhabitants to British rule. But the desire of the Union is for the incorporation of the territory as a fifth province, and there is no doubt that for this purpose the assent of Germany as a member of the Council of the League of Nations will ultimately be necessary. How far this consideration has weighed with General Hertzog in his pro-German trade policy must, necessarily, remain a matter of conjecture, but it obviously would be good policy to make Germany feel that in all commercial matters her interests are safe in the hands of the Union Government. The rights of the natives and the sacred trust imposed by the League Covenant in their regard are not treated *au grand sérieux* in South Africa.

It was obviously most convenient that, under the procedure adopted in accordance with the Conference resolutions, the British Government was assured the full power of calling the attention of the Union to the

principles involved in the policy adopted. Naturally, when the Union Government decided that it would proceed without alteration of policy, the British Government could take no further action.[1] The issue involved is not one vital to the Empire in any sense, and further protests would have been extremely unwise and wholly unjustified. But the procedure assured that the British Government was not confronted with a *fait accompli* regarding which it could only make representations at the cost of receiving a formal and humiliating rebuke. The procedure in this instance has served precisely the purpose intended, and it has been impossible to represent the issue in the Union as one involving an attempt at intervention in fiscal policy by the British Government. It is significant that no exception was taken by the Imperial Government to the very odd procedure adopted by General Hertzog. To bring the new system into effect, it is necessary under the law of 1925 that the treaty should be approved by both Houses of the Parliament, and, therefore, under the old usage, resolutions by both Houses would have preceded any decision to ratify. On finding that the Senate would not accept the proposed resolution, the Prime Minister hastily declared that treaty ratification did not require legislative action, but was justified by the assent of the lower house, leaving it to future action after ratification to obtain the necessary authority of Parliament either by resolutions, if the Senate changed its mind after

[1] Secretary of State, House of Commons, March 12 and 27, 1929. It was made clear that no request for formal ratification had then been made by the Union, but not that such a request would, if made, be negatived. Under the Conference resolution of 1923 (p. 374 *ante*), it rests with the Union to decide what approval justifies ratification.

the general election, or by an Act passed over its head under the provisions of the Constitution by a joint session of the two houses. It is clear that the existing rules under the Conference resolutions of 1926 are sufficiently elastic to concede all that any Dominion can legitimately require, while maintaining the essentials of the unity of the Empire in international law.

It does not seem in point of fact that Dominion statesmen seriously contend that they are the sole advisers of the Crown regarding the issue of full powers and instruments of ratification. What Sir Robert Borden desired was rather that the full powers should be expressed in some way as linked up with the Orders in Council authorising the appointment of Dominion plenipotentiaries so that "it may formally appear in the records that these full powers were issued on the responsibility of the Dominion Government". It has, however, not been thought necessary to depart from the time-honoured forms of procedure in these matters. The issue of instruments is made on the advice of the Dominion and Imperial Governments, but this fact does not appear on the face of the documents; it rests on the fact that advice is in fact tendered, and this advice is duly recorded in the archives of the Dominion and the Foreign Office. This is entirely in harmony with the British practice, and is not seriously opposed by the Dominions. In the case of Canada and the Irish Free State alike, from time to time, questions have been asked regarding the mode in which these recommendations come before the King, and it has not been denied that they are sent through the Imperial Government, represented by the Dominions Office in the first instance. It is clear that the Government of

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the Irish Free State would be very glad to ignore the element of Imperial intervention. It admittedly opens the door to reproaches by their Republican rivals that the boasted status which they have secured is really not one of freedom from external authority. But the fact remains that not even the Minister for External Affairs, who has worked patiently for the aggrandisement of the status of the Free State, can claim that the Free State Government is in direct communication with the King.

It may, however, be argued that the Imperial control is really nominal and must be compared with the Royal veto of legislation in the United Kingdom. The answer to this contention is obvious. The mode of procedure now adopted is not intended to enable the Imperial Government to exercise a final voice in the conduct of external affairs. It is intended to be a vital part of the machinery to ensure the unity of the Empire in foreign relations, and it can be abandoned when, and only when, the parts of the Empire concerned decide that they do not desire to maintain any form of unity and desire to stand apart as distinct States. In that case, assuming that it is worth while maintaining the unity of Sovereign, it can hardly be doubted that the proper mode of procedure is to concede the power to enter into, and ratify, treaties to the Governor-General. There is no constitutional difficulty in this regard; to delegate a portion of the sovereign authority is often necessary, and has parallels in the British Empire itself in recent years in the authority given to the Governor-General of India and the High Commissioner for South Africa. Any other course would place the King in a most difficult posi-

tion. If recommendations from his Dominion Government went to him direct by post or telegram, or through the Dominion's representative in London, and Imperial Ministers could not intervene, it would easily happen that the King had to adopt in regard to one Dominion a policy disliked in the others or in the United Kingdom. It is clear that it would be impossible to expect popular opinion to acquiesce in the spectacle of the Royal signature being appended to documents of diverse and contrary content, and that, in the interest of the attachment of the people to the Crown, it would be necessary to alter the practice and keep the Crown out of controversy.

It has, indeed, been urged by some writers that the King would become an essential figure in the working of the Constitution, since it would fall to him to act as a mediator between the views of the different Dominions and of the United Kingdom. It is, however, clear on a little reflection that such a rôle is an impossible one. It would demand from the holder of the office a degree of capacity which is possessed by few Prime Ministers, and, even if the ability were present—and hereditary kingship denies the probability of such a result—the King could never oppose a Dominion policy without the certainty that his conduct would there be deeply resented and evoke memories of George III.'s American policy. Nor would the case be much better if the King vetoed British projects for the sake of a Dominion. The fact is that the existing methods of procedure are consonant only with the desire for Imperial unity, and will doubtless be discarded if and when that desire ceases to be effectively held. There is nothing inconsistent in this with the view of the Im-

perial Conference, for it stressed diversity of function as much as it insisted on equality of status. Frankly, the two ideals cannot both be carried to the final result of either without conflict, and the present Imperial Constitution is an effort to give effect as far as is possible to both. Its permanence is doubtless dependent on the effective power of operating it without serious friction, and so far it is certain that it has not failed to function.

From the international point of view, it may be admitted that there is a distinct difference between the status of the Dominions and the United Kingdom as regards the treaty power. If the United Kingdom were to negotiate a treaty against the wishes of the Dominions, though not directly affecting them, and if the Government, despite Dominion objections, persisted in ratifying the treaty, it would unquestionably be valid internationally. If, on the other hand, a Dominion could not obtain the British ratification, the treaty would be internationally waste paper. But this theoretic difference of status is of no vital importance; the essence of a constitution is its operation, and the probability of the Imperial Government concluding a treaty against the strong opposition of the Dominions is minimal. The difficulty can arise only if the Dominions should adopt an attitude which ignored the necessity of the United Kingdom making full provision for her security. If the Dominions had disapproved the Locarno Pact—which was not the case—it might none the less have become necessary to enter into a similar pact. But the Dominions may be trusted to remember that the United Kingdom, now vulnerable to air attack, and vitally connected with European affairs, cannot relapse into the indifference to Europe which is pos-

sible for distant Dominions, or for Canada with the aegis of the Monroe Doctrine to give it security.

Can the United Kingdom still bind the Dominions by a treaty entered into without their consent? In international law the answer must doubtless be in the affirmative; in constitutional practice it must equally be in the negative. If in 1928 the British Government had renounced generally, and for the whole Empire, the restrictions on the tariff autonomy of China existing under treaties binding on China, and the time for whose termination by unilateral Chinese action had not arrived, it is clear that in international law the renunciation would have applied to the whole of the Empire. But equally obvious was the necessity in constitutional usage to obtain the assent of the Dominions to the plan proposed, and accordingly the assent of the Dominion Governments was notified on December 20 to China simultaneously with the notification of the British consent to termination of the obligations of China in this regard.[1] That the Empire can be bound by the British Government is clearly contemplated by the treaty procedure laid down by the Conference. If a treaty is negotiated without objection by a Dominion, it will be presumed that the Dominion concurs in ratification for the whole Empire, when that is from the nature of the treaty desirable. This procedure would be impossible if internationally a Dominion could only be bound by its formal assent, and still more, if that formal assent must be signified, as was once contended by Mr. Doherty[2] for Canada, by the act of signature of dele-

[1] So also as regards Persia on May 10, 1928.

[2] See Keith, *War Government of the British Dominions*, pp. 159, 160. The important smuggling treaty of 1924 with the United States binds Canada.

gates specially representing that Dominion. He spoke of this as a rule resulting from the form of procedure adopted at the Peace Conference, but the action taken in many cases since entirely disposes of this contention. Thus, when extra-territorial rights were renounced in Albania in 1926, the renunciation, though applying to all British subjects, was intimated by the British Government alone, without reference to the views of the Dominions, and the treaty of July 14, 1925, renouncing the remains of extra-territorial jurisdiction in Siam is similarly concluded without allusion to the Dominions, as was the great treaty of Lausanne of 1923. In future in such cases under constitutional usage the Dominions will be mentioned as concurring, but that is a matter not essential in international law.

The arrangements as to diplomatic representation of the Dominions and their reception of foreign envoys are also conceived on the basis of the unity of the Empire, as opposed to the existence of distinct sovereignties connected by a mere personal union.[1] The establishment of diplomatic representation in each case has been carried out through the agreement of the British and Dominion Governments and the representations made by the former to the foreign Power. The intervention of the Imperial Government is essential whenever a new Dominion diplomat is accredited to a foreign Sovereign, for his letter of credence is issued by the King on the ultimate authority of the Secretary of State for Foreign Affairs, and the letter of recall is similarly signed on like authority. The reception of foreign envoys

[1] See Chap. XX.

is similarly motived. They are accredited to the King as the symbol of Imperial unity, though necessarily the letters of credence are actually presented not to His Majesty in person, but to the Royal representative in the Dominion.

CHAPTER XX

THE DIPLOMATIC REPRESENTATION OF THE DOMINIONS

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WE have seen that for a time Sir Wilfrid Laurier was inclined in 1910–11 to assimilate the position of the consular representatives of foreign Powers in Canada to those of diplomats, but his policy was not continued by Mr. Borden's administration. On the other hand, the relations of Canada with the United States continued to be extremely intimate, and the working of the Joint Commission[1] established under the Boundary Waters treaty of 1909 familiarised Canadian and American opinion with the spectacle of international co-operation between the two countries on a footing of equality, and free from any Imperial intervention, beyond the appointment of the Commissioners by the King, who acted in accordance with the wishes of the Dominion Government, as provided in the treaty itself. Moreover, during the latter part of the war of 1914–18 there was established at Washington a Canadian War Mission which came to serve largely as a diplomatic agency, promoting fuller co-operation between the two countries, and supplementing vitally the work done by the British Ambassador. The way, therefore, was paved for the taking of a logical step in advance, and Sir R.

[1] See p. 299 *ante*.

Borden pressed firmly on the British Government the desirability of permitting the establishment of formal diplomatic relations between Canada and the United States. There were serious difficulties to be faced, as is proved by the fact that the issue was first raised formally in 1918 and formed the subject of exchanges of views with the British Prime Minister, and the Foreign and the Colonial Secretaries. The matter raised international no less than constitutional difficulties, especially as the United States had just shown a strong objection to the admission of the right of the British Dominions to have distinct seats on the Assembly of the League. From the national point of view, it was clear that separate representation might well be a prelude to the weakening of the connexion of Canada both with the United Kingdom and the other parts of the Empire. It was only by degrees that the issues were reconciled, and finally, on May 10, 1920, the Canadian Prime Minister was able to announce that "as a result of recent discussions an arrangement has been concluded between the British and Canadian Governments to provide more complete representation at Washington of Canadian interests than has hitherto existed. Accordingly, it has been agreed that His Majesty, on the advice of his Canadian ministers, shall appoint a Minister Plenipotentiary who will have charge of Canadian affairs and will at all times be the ordinary channel of communication with the United States Government on matters of purely Canadian concern, acting upon instructions from, and reporting direct to, the Canadian Government. In the absence of the Ambassador the Canadian Minister will take charge of the whole Embassy and of the representation of Imperial as well

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as Canadian interests. He will be accredited by His Majesty to the President with the necessary powers for the purpose."

The plan, therefore, really contemplated that the Canadian Minister would supplement and take over from the British Ambassador part of the work of the Embassy, namely, the great amount of business of purely Canadian concern, and that he would work in the most cordial co-operation with the Ambassador, so that, whenever the latter was away from his post, the whole business of the Embassy would automatically pass under the control of the Canadian Minister. This conception of close union is made clear by the addition in the original announcement of the words: "This new arrangement will not denote any departure either on the part of the British Government or of the Canadian Government from the principle of the diplomatic unity of the British Empire." If the plan then adumbrated had been carried out by the Canadian Government, very possibly the institution would have developed into a very close co-operation of the Ambassador and the Minister, so that the unity of the British diplomatic representation would have been practically unimpaired. But circumstances prevented any early action. The new plan was far from being acceptable to Australia, which did not like the idea of distinct diplomatic representation for the Dominions at all, and in any case pointed out that it would not be satisfactory to the Commonwealth that a Canadian Minister should represent the interests of the Empire in the absence of the Ambassador. It is, in fact, clear that the Minister might have been placed in a position of some embarrassment if he had had to deal with an issue which

involved proposals by the Commonwealth for closer commercial relations with the United States, the effect of which might quite conceivably be to result in disadvantage either to Canadian agricultural or manufactured products. The fall of Mr. Meighen's Government and the return of the Liberals to power told against any early action, because, among others, the veteran Mr. Fielding was not in the least enamoured of any attempt to create an international status for Canada. Moreover, the mere issue of the choice of a representative of the Dominion was not easy. It was clear that, if the Minister were a poor man, he would take a very inferior place in the social and political life at Washington, and it was not at first easy to choose a rich man who would also desire to act as Minister.

Hence it came to pass that it was the Irish Free State which secured the first appointment of a Dominion diplomat. It was part of the agreement for the creation of the Free State that it should have the same rights as Canada, and, though Canada had not exercised the right to appoint a Minister, there was no reply to the desire of the Irish Free State to exercise the right. Moreover, the Free State in the days of its struggle for independence had been fond of keeping various emissaries abroad, without, of course, any recognised status, but regarding themselves as diplomats. A complete cessation of such activity would have been regarded by opponents of the Government as a base surrender of national rights. Effect accordingly was given to the Irish desire in 1924, when, after the matter had been duly arranged in advance, the following note was addressed to the United States Government on June 24: "His Majesty's Government have come to the

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conclusion that the handling of matters at Washington exclusively relating to the Irish Free State should be confided to a Minister Plenipotentiary accredited to the United States Government. Such a Minister would be accredited by His Majesty the King to the President of the United States and he would be furnished with credentials which would enable him to take charge of all affairs relating only to the Irish Free State. He would be the ordinary channel of communication with the United States Government on those matters. Matters which are of Imperial concern, or which affect other Dominions in the Commonwealth in common with the Irish Free State, will continue to be handled as heretofore by this Embassy."

Emphasis was also laid on the fact that "the arrangements proposed by His Majesty's Government would not denote any departure from the principle of the diplomatic unity of the Empire. The Irish Minister would be at all times in the closest touch with His Majesty's Ambassador, and any question which may arise as to whether a matter comes within the category of those to be handled by the Irish Minister or not would be settled by consultation between them. In matters falling within his sphere the Irish Minister would not be subject to the control of His Majesty's Ambassador, nor would His Majesty's Ambassador be responsible for the Irish Minister's actions." The acceptance of the Minister on this footing in deference to the desire of the British Government was formally notified by the United States Government on June 28: "The President, always happy to meet the wish of His Majesty's Government in every proper way, will be pleased to receive a duly accredited Minister Pleni-

potentiary of the Irish Free State on the footing you indicate."

The accord thus reached was translated into action by the appointment of Professor Timothy Smiddy as the first Irish Minister to the United States, his credentials being presented to the President on October 7, 1924. But the United States Government did not hasten to reciprocate the appointment, and no move was made in this direction until the matter had been raised to a new pitch by the decision of the Canadian Government to take action in this sense. Canada's action in this matter cannot be disconnected from the decision simultaneously taken to secure the transfer from the Governor-General of all handling of correspondence with the British Government,[1] for he had also been the regular intermediary with the British Ambassador at Washington, and had thus secured that both the British Government and the Ambassador were kept in effective touch with Canadian views. If his function in the one aspect were to disappear, his function in the other must likewise pass away. At the same time the Government had the good fortune to find in Mr. Vincent Massey a man of great wealth and business experience, who was both willing to represent the Dominion at Washington and able to bear the cost of the suitable maintenance of that office. The fact that it was intended to make the appointment was known by June 7, but action was postponed pending the deliberations of the Imperial Conference.

The Conference frankly recognised that in the sphere of foreign politics, as of defence, the major share of responsibility rested, and must for some time

[1] See p. 247 *ante*.

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continue to rest, with the British Government. Nevertheless, all the Dominions were engaged to some extent, and some to a considerable extent, in the conduct of foreign relations, particularly those with foreign countries on their borders. Thus the growing work in connexion with the relations of Canada and the United States had led to the necessity of a Minister Plenipotentiary to represent the Canadian Government at Washington. The Conference "felt that the governing consideration underlying all discussion of this problem must be that neither Great Britain nor the Dominions could be committed to the acceptance of active obligations except with the definite assent of their own Governments". It was agreed that on all matters of foreign relations the principles applicable to the negotiation of treaties should be taken as furnishing the guiding principle. That, of course, essentially emphasised the doctrine of co-operation and the maintenance of unity of action.

The Conference having thus approved, the Canadian decision, which took formal shape in an Order in Council of November 10, duly provided for the appointment of Mr. Massey, which was carried out in the normal way by the King, and Mr. Massey presented to the President on February 18, 1927, his letter of credence.

The form of the letter deserves attention. The King's style is recited in full, showing that he is acting as representing the whole of the Empire, and after reciting the conferment of the rank of Envoy Extraordinary and Minister Plenipotentiary on Mr. Massey "with the special object of representing to the United States of America the interests of Our Dominion of

Canada", it continues: "We request that you will give entire credence to all that Mr. Massey may represent to you in Our name, especially when he shall assure you of Our esteem and regard and of Our hearty wishes for the welfare and prosperity of the United States of America. And so We commend you to the protection of the Almighty."

It would, of course, have been a deliberate slight to the Dominion to fail to reciprocate, and accordingly the President on February 3 appointed Mr. William Phillips as United States Minister to Canada, and Mr. F. A. Sterling as Minister to the Irish Free State. The latter appointment could not be withheld in view of the appointment to Ottawa without a deliberate affront to the Free State, which was out of the question, in view of the strength of the Irish element in the United States. The mode in which the appointment was dealt with is interesting. The President naturally accredited the envoys to the King-Emperor by his full styles, with a request "to receive him favourably, and to commend him to the officials of the Dominion of Canada in order that full credence may be given to what he shall say on the part of the United States. I have charged him to convey to you and to the Dominion of Canada the best wishes for the prosperity of the British Empire. May God have your Majesty in his wise keeping. Your good friend, Calvin Coolidge." The credentials were presented by Mr. Phillips on June 1 at Ottawa, and by Mr. Sterling at Dublin on July 27. It will be noted how completely the forms observed acknowledged the unity of the Empire.

The Canadian Government proceeded, naturally enough, to develop the system of representation. The

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French-Canadian element naturally suggested that Paris should receive a Canadian Legation, and this motive was strengthened by the fact that Canada had so long negotiated commercial treaties with France, and that there was a strong community of interest between the two countries. In fact, the Canadian Commissioner-General in France had been accorded by the French Government many privileges and marks of attention which had paved the way for his transformation into a diplomatic agent. The French Government appreciated the proposal, and the Chamber on March 16, 1928, passed without discussion the Bill to enable the Government to establish a French Legation in Canada.[1] Almost at the same moment it was decided to exchange Ministers with Japan, in which a Canadian Trade Commissioner had hitherto functioned, while Japan had a Consul-General at Ottawa, who had informally exercised certain diplomatic functions. The next step was that announced in November 1928 by the Irish Free State, when it decided to recall Professor Smiddy to the more important duties of acting as High Commissioner for the Free State in London, and, while replacing him at Washington, to create new Legations at Paris and at Berlin. It was not surprising that the Union of South Africa in 1929 announced its intention of acting in a similar manner. The commercial treaty which it had concluded with Germany rendered it almost inevitable that close relations should be aimed at, if for no other reason than to emphasise the independence of the Union and its readiness to seek associations with nations other than

[1] M. Georges Knight presented his credentials from the President to the King at Ottawa on Nov. 16, 1928.

the United Kingdom. More surprising was the proposal to be represented also at Buenos Ayres.

The rationale of the system of representation of the Dominions by Ministers was discussed fully in the Canadian House of Commons on June 11, 1928, with special reference to the case of the appointment to Tokio. The objections were excellently put by Mr. R. B. Bennett, the able leader of the Opposition, who presented the arguments against the appointment in the most effective manner possible. He insisted, in the first place, that there was no practical reason for the change contemplated, for the existing system was functioning effectively and what had been necessary in the way of securing Canadian needs had been carried out through the existing agencies. Secondly, there must be a single foreign policy for the Empire, and this was impossible if each Dominion were to have a policy of its own in foreign affairs. In the third place, the presence of distinct Legations in foreign capitals would foster divergences in foreign policy and militate against the idea of common partnership in a united Empire. Finally, the appointment to Tokio would suggest that Canada was a sovereign State. But Canada was not a sovereign State even for internal purposes, as her inability to alter her Constitution and the paramountcy of Imperial Acts sufficiently established. There could be no such thing in international law as equality of status between Canada and Great Britain until such time as the country had the powers of a sovereign State and absolute independence both within and without the Dominion. To such independence he was absolutely opposed. The Prime Minister deprecated any suggestion of independence, agreeing

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in this regard with the emphatic disclaimer of any such idea by the acting Prime Minister, Mr. Lapointe, on August 29, and insisted instead that the idea of the Dominion was self-dependence. The old system of representation at foreign capitals by a single diplomatic representative implied centralised control, but there were no longer any supporters of federation, and few would even advise the creation of any kind of Imperial Council to co-ordinate foreign policy. The plan of having separate representatives at the great foreign capitals was precisely in accord with the modern plan of co-operation; just as the central Governments co-operated by direct communication, so at the capitals the several representatives of these Governments would work together for the common interests of the Empire. The presence at Washington of the British Ambassador and the Ministers of Canada and of the Free State was not a factor tending to the dissolution of the Empire, but rather made for its consolidation.

The general argument in favour of diplomatic representation was strengthened in the case of Tokio in Mr. Mackenzie King's view by the advantages of having a Canadian diplomat to represent directly to the Japanese Government the sentiments of the Dominion on the migration issue. It must, however, be admitted that it is not clear that this point necessitated any change in procedure, for the arrangements to limit Canadian reception of Japanese had been carried out since the first without too much trouble through the existing machinery, and the latest concession from Japan by which the number of fresh immigrants was limited to one hundred and fifty a year

had been secured without diplomatic representation by a Canadian at Tokio. On the general issue, however, there is undoubtedly a perfectly valid case to be made out by Canada. Governments which are in accord will not normally be rendered less so because they have separate envoys in foreign countries, and there is much business which interests one Government only and which can better be dealt with by a special emissary of that Government than by a single representative of the Empire. On the other hand, it is perfectly clear that there is nothing whatever contrary to the recognition of the full status of the Dominions in the use of the British representative, provided always that his instructions in all matters affecting the Dominion concerned are arrived at by agreement between the two Governments. As a matter of fact, it is obvious that the Dominion Governments would act utterly absurdly if they attempted to establish legations all over the world, even apart from the cost involved. It is an obvious advantage of the whole structure of the Empire that the Dominions can still have the full use of the British diplomatic and consular services, despite their new status. The facts at the present time show how advantageous this position is. The citizens of the Irish Free State in the United States are entitled to the full support and aid of the British consular service, despite the fact that they have an Irish Free State Minister at Washington, who, of course, has no control over the British consuls, but through the British Ambassador is assured of their cordial assistance.

The unity of the Empire is formally attested on every occasion of an appointment by the intervention

of the grant of letters of credence by the Crown, while the creation of diplomatic relations is in each case mediated by the Imperial Government. Needless to say, the formal authority for the issue of the letters of credence rests with the Secretary of State for Foreign Affairs, on whose advice the letters are ultimately issued. The primary advice inevitably is that of the Dominion Government, but the British concurrence is an essential part of the plan. The procedure, of course, is deliberate. To omit it would be to render the whole of the unity of diplomatic representation purely illusory. In it lies the essential connexion between the British Ambassador and the Dominion Ministers at those courts where they have been appointed. They stand alike in the eyes of the foreign States, because they represent the same King and Governments which act not in casual but in an effective and necessary unity. Moreover, the most formal act of the Minister, the conclusion of treaties, is carried out under full powers granted by the King on the authority of the Imperial Government, and treaties are ratified with like authority.

The original proposal of 1920 had contemplated that the Canadian Minister should take over the whole of the charge of the Embassy at Washington in the absence of the Ambassador. When it was determined that an Irish Minister should be appointed, this arrangement obviously became impossible of acceptance. The affairs of Canada could not be handed over even temporarily to an Irish envoy save with Dominion assent, which was out of the question. The proposal might, indeed, have been revived in 1926–7, when it was decided to make the appointment of Mr. Massey

to the Legation, but Mr. Mackenzie King had never approved of this part of the scheme, and it was known to be disliked by the Commonwealth of Australia. It was, therefore, with general assent allowed to expire. But Sir R. Borden[1] has deprecated the decision, on the ground that recession from responsibility does not denote an advance in status. Moreover, as he points out, as Governments control by telegraph the actions of their envoys, no injury to Canadian or Imperial interests could have resulted from the maintenance of the original proposal.

In March 1929 an excellent example was afforded of the conjoint[2] action of the Ambassador and the Canadian Minister in their enquiries as to the case of the British vessel *I'm Alone*, which was sunk by gunfire beyond territorial waters by an American vessel in the process of enforcing the prohibition law, and in exercise of the right of hot pursuit in circumstances which rendered the applicability of the right decidedly dubious. The fact that the vessel was registered in Canada made the issue of special concern to the Dominion Government, while the British Government was deeply concerned in an episode in the course of which a naturalised British subject had been supposed to have been killed, especially as the United States action, if valid at all, could only be so under the terms of the treaty of January 23, 1924, regarding the smuggling of spirituous liquor into the United States, which permitted action in certain cases beyond territorial maritime limits. Moreover, under Article 4 of the treaty,

[1] *Canada in the Commonwealth*, p. 98.

[2] For an excellent instance of Canadian action in a purely Canadian issue (entry of Canadians into the United States for daily work) see *The Round Table*, xvii. 812-15.

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compensation, if claimed, is dealt with by two commissioners, appointed one by each of the high contracting parties, with reference, if they cannot agree, to the Pecuniary Claims Tribunal under the treaty of 1910. If a Canadian claim were made, clearly the Canadian Government would be represented by the commissioner or on the Pecuniary Claims Commission.

There seems, therefore, to be excellent prospects of the verification of the feeling of the Imperial Conference of 1926 "that most fruitful results could be anticipated from the co-operation of His Majesty's representatives in the United States of America already initiated and now further to be developed". At the same time the Conference made a most important contribution to the doctrine of Imperial unity in diplomacy by its pronouncement as to the channel of negotiations: "In cases other than those where Dominion ministers were accredited to the Heads of Foreign States, it was agreed to be very desirable that the existing diplomatic channels should continue to be used, as between the Dominion Governments and foreign Governments, in matters of political and general concern." The dictum is a clear intimation that the Conference disapproves any attempt to carry on irregular negotiations such as were attempted by the Free State before its recognition as such by the British Government. The reasons for its attitude are obvious; the regular procedure secures the power of the British Government to insist that no political treaty shall be made without full consideration of all that it implies for the Empire as a whole, and this necessity might easily be evaded if Dominion Governments fell into the risky practice

of negotiating informally but none the less effectively with foreign States.

Of very subsidiary interest is the decision which was taken at the Imperial Conference to alter the procedure with regard to the grant of exequaturs to consuls appointed to the Dominions by foreign Powers. The practice had, as we have seen,[1] long prevailed under which the grant of exequaturs was conditional on the concurrence of the Dominions in the action proposed, but this plan had not been followed in the case of consuls *de carrière* on the very natural ground that these officers, belonging as they did to the established foreign consular service, were not local residents, and there could be no reason why the Dominion Governments should desire to take exception to their appointment. It was, however, clear that on theoretical grounds the Dominion Governments should be asked to agree to the appointments, and, as a further recognition of the position of the Dominions in the event of the appointment proving acceptable, the exequatur should be sent to the Dominion Government concerned for countersignature by a Dominion Minister. Instructions to this effect were given forthwith. The procedure adopted is decidedly curious, but it is clear that it has given satisfaction to the Dominions, and there seems no ground on which exception could be taken to it. The Imperial Government has no interest in the appointment of consuls to the Dominions, and in the period before the Conference the Dominion Governments when they took exception to proposed appointments of local residents were assured of deference to their wishes.

[1] See p. 292 *ante*.

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So far the appointments by the Dominions of consular officers to foreign States has hardly been developed. A consular appointment to Angola by the Union of South Africa did not take enduring shape,[1] and the question remains to be regulated later. The difficulties of the position are clear. At present the British consular service is controlled and governed, under Imperial legislation and the prerogative, by the Imperial Government, and has many powers expressly given to it by Imperial legislation which are valid against British subjects in any foreign country. Dominion legislation could not give, as matters stand, any such effective powers, and there are striking advantages in the acceptance by the Dominions of the advantages of the use of the British consular service.[2] For trade purposes, of course, it is necessarily supplemented by the appointment of Trade Commissioners under various styles and with, in some cases, very important powers. The Commonwealth of Australia, for instance, has made special efforts to secure effective representation at the United States, but, despite much pressure, the Commonwealth Government has refused to accept the proposals that diplomatic status should be obtained for such officers; the ground of that refusal is simple. Australia, like New Zealand, regards it as undesirable that the unity of the diplomacy of the Empire should be impaired by the multiplication of diplomatic representatives in foreign capitals. But the right to accredit and receive diplomats is frankly recognised to exist. It is in fact clear enough from the terms of the

[1] General Hertzog, House of Assembly, April 25, 1928.

[2] A curious complaint arose in 1926 in the Irish Free State that British consuls did not recognise Irish passports; see Gwynn, *The Irish Free State*, pp. 107, 108.

report of the Imperial Conference that it was by no means enthusiastic for the extension of diplomatic representation, and that it approved it especially when there was substantial practical need for supplementing the work of the British representative.

CHAPTER XXI

PEACE AND WAR

I. *Active and Passive Belligerency*

THERE can be no doubt that, under the present constitutional understandings within the Empire, the right of any Dominion during a British war to remain essentially on the defensive is fully recognised. It might, indeed, have been thought that the enhancement of Dominion status as the result of the participation of the Dominions in the war would negate this attitude of indifference. In the pre-war period, it might be argued, the Dominions had no control of foreign policy; since they had been admitted in 1917 and 1918 to the Imperial War Cabinet, and since at the Conferences of 1921, 1923, and 1926 foreign policy had been discussed and settled in common, there could no longer be any question of passivity in British wars. But this idea failed entirely to be realised when in 1922 a crucial instance of the application of the principle arose.

The issue of 1922 was very different from a mere local war such as that of 1919 with Afghanistan, during which the whole Empire was involved in war by a purely British line of policy, for which the Governments of the United Kingdom and of India were alone responsible. That the Dominions should take any

active part in such a struggle was wholly unnecessary, and they could clearly not be expected to desire to have any responsibility for British policy on the Indian frontier in its relation to the defence of India. But the events of 1922 were the direct sequel of matters in which the Dominions had been deeply concerned. The war with Turkey was not merely a necessary and very serious part of the great European war, but it had special interest for the Australasian Dominions, which had suffered most severe losses in the struggle on Turkish territory. When active hostilities had been brought to a close by the armistice of Mudros on October 30, 1918, the interest of the Dominions in the peace settlement stood exactly on the same footing as it did with regard to the other peace settlements, but it was inevitable that, when an unfortunate series of events postponed any final disposal of the issues, the Dominions, having obtained what they most desired in the way of mandates for the former German colonies, were content to leave active participation in the handling of the Turkish question to the British Government. There appears to have been a distinct failure on the part of that Government to keep the Dominions in close and effective touch with the trend of international events, while the Dominion Governments for their part were so busily engaged in local affairs that they were apparently not aware from study of the press reports of the extremely difficult and dangerous position which developed in Turkey, and which produced in September 1922, at Chanaq on the Asiatic side of the Dardanelles, a very real danger of an armed conflict between the British forces and those controlled by the Turkish National Assembly at Angora.

Hence it was with the greatest surprise that the Dominion Governments received a telegram from the British Government, despatched on September 15, stating the facts of the case and the danger of an armed conflict, and "inviting them to be represented by contingents in defence of interests for which they have already made enormous sacrifices and of soil which is hallowed by immortal memories of the Anzacs". The appeal to the memory of the battles fought by the Anzacs was decisive for New Zealand, which at once associated itself with the British position and undertook to send a contingent if necessary; this policy was affirmed by a full Cabinet meeting on September 16, whose decision was at once published by Mr. Massey. In the Commonwealth, Mr. Hughes almost at once decided with the assent of his colleagues to assure the British Government that Australia desired to be associated in any action deemed necessary to ensure the freedom of the Straits and the sanctity of the Gallipoli Peninsula, and that, if circumstances rendered such action necessary, a contingent of the Commonwealth forces would be despatched. At the same time, it was stated that the issues would be laid before the Parliament of the Commonwealth on September 19, in order that its decision might be obtained. The attitude of the executive did not pass in Parliament without acute discussion. Mr. Hughes presented the issue as essentially one of Empire interest; it was vital to the Empire that there should not be in control of the Dardanelles a hostile Power which would menace the security of the Suez Canal, a matter of life and death to the Empire. At the same time, he insisted that Australia had asked for the fullest information, and that it had no sym-

pathy with any aspirations of Greece or with anything but the essential security of the Empire itself. But Australia was wholly opposed to war, if peace could be secured without it, and it had asked the Australian representative at Geneva acting with the other representatives of the Empire to seek the aid of the League of Nations. Later, he assured the Opposition that the step of suggesting League intervention, which had been taken also by Dr. Nansen, the Norwegian Delegate to the League, and the Persian Delegate, had had the support of all the Dominion representatives. He also insisted that the essential point of the British policy was merely that there should be no vital change in the *status quo* pending the holding of a Conference at which the issues affecting Turkey could finally be adjusted. None the less, the Opposition suggested that any aid to be given to the United Kingdom should be dependent on the holding of a referendum, which, in the circumstances, meant an absolute refusal of aid, seeing that referendum could not have been arranged for many weeks at soonest. The attitude of the Dominion representatives, it must be added, is shrouded in a certain mystery. Mr. Hughes was informed by the Australian High Commissioner that they had joined in a representation to the Prime Minister suggesting reference to the League, but this statement has been described as unfounded. In any case, Dr. Nansen's proposal to the Political Commission of the League Assembly, when in session, that it should request the Council of the League "to consider without delay what measures it might take with a view to the cessation of hostilities in Asia Minor, either by offering its good offices to the belligerents or in any other way", was not supported

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by Lord Robert Cecil, the spokesman for South Africa, who concurred in this respect with Mr. H. A. L. Fisher speaking for the British Empire, and the representative of France. Lord R. Cecil's action, however, was not apparently directly inspired by his Government, for General Smuts was credited with the view that the freedom of the Straits was essentially an issue to be placed under the aegis of the League. His own view was not expressed until September 25, as a result of delay in reaching him by telegraph; the issue had then assumed an aspect in which Dominion intervention was of no essential moment, and accordingly he was not compelled to commit himself to any active aid in the struggle. In fact, on September 29 the assent of the Angora Government was obtained to the holding of a Conference with the United Kingdom, France, and Italy, and the crisis was satisfactorily surmounted.

In Canada, however, the episode raised very fundamental issues. The Dominion Government was unable to satisfy itself as to what action should be taken from the meagre information at its disposal. It is clear from Mr. Mackenzie King's attitude in the House of Commons on February 1, 1923, that he resented deeply the fact that the urgent telegram from the British Government of September 15 only reached the Dominion Government after its substance had been published in the Canadian Press, who had received it from London independently. Further, he insisted that this telegram was the first and only intimation received from the British Government that the situation in the Near East had reached a critical stage and that the need might arise of asking for military assistance. Eventually the Canadian Government determined to ask whether

Parliament should be called to deal with the issue, to which proposal a negative reply was sent from London. The difficulty of the British Government is clear; it was unwilling to allow the publication of the important and very secret information which it was sending to the Dominions, preferring to risk the loss of active Dominion support rather than incur the difficulties which the making public of the dangers of the situation and of the French attitude in connexion with it would produce in Europe. Mr. King had to face attack by Mr. Meighen, who argued that, as Canada had approved of the Sèvres Treaty, it should have been willing on principle to send forces to maintain that settlement. But Mr. King replied with weight that Canada was not bound by the treaty, which had never been ratified by the British Government, and that it remained open to decide its action on the merits of the case.

The most important outcome for Canada of the issue was a declaration of policy by Mr. King on February 1, 1923, which may be said to have become an essential doctrine of the Constitution of the Dominion, and to be as important for the Dominion as is Article 49 of the Irish Constitution for the Free State. "We have felt," he said, "and feel very strongly, that if the relations between the different parts of the British Empire are to be made of an enduring character, this will only be through a full recognition of the supremacy of Parliament, and this particularly with regard to matters which may involve participation in war. It is for Parliament to decide whether or not we should participate in wars in different parts of the world, and it is neither right nor proper for an individual, nor for

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any group of individuals, to take any step which might limit the rights of Parliament in a matter which is of such great concern to all the people of our country." This is, of course, the counterpart of the rule that, save in case of actual invasion, the Irish Free State can be involved in active belligerency only with the assent of Parliament. War, of course, still existed between the Empire and Turkey, but Mr. King definitely asserted that the Parliament of the Dominion alone must decide what part, if any, Canada would take in the active conduct of such a war when her shores were not actually being attacked.

The doctrine of parliamentary responsibility thus asserted was to be strengthened by the action of Mr. Meighen on November 17, 1925, at Hamilton, when he enunciated a more far-reaching doctrine for limiting the authority of the Dominion Government. His motive for this view was the prejudice which his party had suffered at the last general election by reason of the fierce attacks made upon him personally in Quebec in respect of his part in the adoption of compulsory service in Canada in 1917–18. He was freely accused of advocating the sending of Canadian forces overseas even without consulting Parliament, and of supporting Imperialistic policies. Such accusations were wholly fatal in so peace-loving and unwarlike a community as the people of Quebec, and, in view of the doubt whether the Conservative Party was ever likely to secure power unless there was some change of heart in that province, Mr. Meighen ventured on a rather dangerous doctrine. He advocated the rule that, before troops should ever be sent overseas, there must be a general election held on that issue. It is not surprising

that his attitude was condemned[1] by men such as Mr. Rowell, who was a prominent figure in the period of Coalition Government in the Dominion, and who pointed out that an acceptance of this doctrine would paralyse the hands of any Dominion Government in time of sudden stress, and prevent it from rendering aid at a critical juncture. Though the doctrine has never been formally homologated by the Government of Mr. Mackenzie King, the effect of such a declaration cannot be ignored, and Mr. King himself on June 21, 1926, when dealing with the proposal very tardily to express approval of the resolutions of the Imperial Conference of 1923 on treaty procedure, definitely proposed, and the House accepted, the doctrine that "before His Majesty's Canadian ministers advise ratification of a convention or treaty affecting Canada, or signify acceptance of any treaty, convention, or agreement involving military or economic sanctions, the approval of the Parliament of Canada should be obtained". The doctrine expresses the fixed view of the Dominion Parliament, and it establishes the supremacy of Parliament, though it does not question the competence of Parliament to deal with these matters without a mandate from the people. In view of this doctrine it was, naturally, impossible for the Dominion to accept any responsibility under the Locarno Treaties, though the power to accept was given by the treaty to the Government of the Dominion and not to Parliament. No Canadian Parliament would have been willing to commit itself to the

[1] He defended it at the Winnipeg Convention, October 1927, but Mr. Ferguson, Premier of Ontario, repudiated it, and no resolution was adopted by the Conservative Party in this sense.

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acceptance of a definite military obligation of a major character.

The attitude of Canada and the rule of law in the Irish Free State are unquestionably in complete harmony with the views of other Dominions. The active participation in any war would never be undertaken—save, of course, in mere self-defence against local attack—without the immediate concurrence of Parliament, whose intervention is the indispensable preliminary to the conversion of passive into active belligerency. The Dominions, therefore, are fully protected by constitutional usage from any rash action by Dominion Ministries. If these Ministries are impotent to prevent the Dominions being passively engaged in war by a British declaration of hostilities, they are at least protected by necessity of consulting their Parliaments from undue pressure on their patriotism being exerted by the Imperial Government. Point, of course, is lent to this position by the unhappy events in the Union consequent on the readiness of General Botha in 1914 to accept the earnest request of the British Government to co-operate in the war by the invasion of South-West Africa in order to destroy the wireless signalling station there, which was affording great help to the movements of the German war vessels operating against the Allies.

II. *War and Neutrality*

It is clear from our discussion that the Dominions do not possess the unfettered exercise of the treaty power which is a mark of independent States. It is equally certain that they likewise do not possess the

power to make war or peace, or to remain neutral in a British war.

The right to make war is apparently not claimed by any Dominion statesman; it is indeed obvious that such a claim would not be popular, for in none of the Dominions is there any belligerent tendency. The peoples of these territories are fortunate in having all the land they can possibly desire, save perhaps in the case of the Union. The advantage of incorporating Delagoa Bay in the Union would be considerable, but there is no serious tendency to contemplate any armed intervention to achieve this end, and the future fate of the Portuguese colonies depends on many factors which do not permit of any confident prediction. The Pact to Renounce War, accepted by the Union, precludes the idea of aggression, and accordingly the constitutional right to declare war independently of the United Kingdom has never, it seems, been an object of Dominion aspirations.

On the other hand, there has gradually been developing in the Dominions the claim that the Dominions have the right to remain neutral in the case of a British war. This reminds us of the Victorian proposal of 1870, but the claim now put forward, when it is definitely articulated, is that the present stage of development of the Dominions has actually reached such a point that the right to remain neutral has been achieved, and would readily be recognised by foreign Powers. The issue, of course, has been rendered more complex by the coming into being of the League of Nations with its efforts to preclude recourse to war, and to penalise those Powers which go to war contrary to the rules laid down in the League Covenant. It is obvious that

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the Covenant by Article 16 greatly simplifies the question as to whether a foreign State should be regarded as at war with the Empire. It provides that, if a State resorts to war in disregard of its obligations under Articles 12, 13, and 15 of the Covenant, it shall *ipso facto* be deemed to have committed an act of war against all other members of the League. These members must then subject the offender to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial, or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a member of the League or not. If the correct interpretation of this Article is that a state of war is immediately created[1] between the other members of the League and the offending State, then the issue of neutrality falls to the ground. Nor, even if this interpretation is incorrect, is it likely that a Dominion would be desirous of asserting a neutrality which was not asserted by the United Kingdom. There, however, remain cases in which war is permitted by the Covenant without any obligation of any sort being imposed on the other members of the League, and the issue might then arise whether a Dominion could proclaim its neutrality, and expect recognition for that neutrality by international law. The crucial point in such a case would be whether the foreign Power concerned could claim that for a Dominion to violate neutrality because the United Kingdom was at war constituted on its part a breach of the Pact to Renounce War, or conversely, whether it was

[1] Wheaton, *International Law* (6th ed.), i. 600.

a breach of that Pact for a foreign State which was at war with the United Kingdom to regard the Dominion as also belligerent, despite the announcement of the latter that it did not desire to be at war but had declared its neutrality.

It must be confessed that the arguments in favour of the right to neutrality have never been effectively pleaded. The earlier comments on the report of the Imperial Conference of 1926 revealed clearly the feeling of Dominion politicians that neutrality could not be claimed. Mr. Bourassa in Canada on March 29, 1927, insisted that it was impossible for Canada to be a part of the Empire and at the same time a fully independent State. General Hertzog in the Union on March 16 held that the two things were perfectly compatible, but he evaded the issue of neutrality, and Mr. Tielman Roos, the ablest of the Nationalist party, admitted candidly on May 23 that the rules of international law made the whole Empire at war if one part were at war, and that, if any change were to be made in the position, it must be by an alteration of the rules of international law. The only correction needed in this statement is that the only part which can commit the Empire to war is the United Kingdom, for, as the Governor-General has no power to declare war,[1] if hostilities were undertaken by a Dominion, they could be disavowed by the United Kingdom without any breach of the constitutional law of the Empire, and such disavowal might, if it so desired, be accepted by the foreign Power aggrieved, in which case the Dominion attack would become a mere marauding raid. On December 16, 1926, the

[1] No other war prerogatives have yet been delegated, the matter remaining as in 1914–18; see p. 314 *ante*.

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Minister for External Affairs of the Irish Free State would not commit himself to the view that the Free State could only be involved in war by a declaration made by the King on the advice of his Irish Ministers; such a view might be argued for, but he admitted it was not established. On February 17, as Minister for Defence, he admitted that any attack on the United Kingdom would no doubt be accompanied by an attack on the Free State, and both he and the Minister for External Affairs, Mr. K. O'Higgins, urged that in view of this eventuality the Free State must be prepared to assert her position. This position clearly admits that it was idle to hope that neutrality could be recognised.

The issue, naturally, was not stilled by these observations, and in the Free State it was revived by a question addressed to the Government to elicit its view as to whether the British troops were, in its opinion, entitled in the event of war to operate in the Free State for purposes of Imperial defence. It was apparently suggested by Mr. Fitzgerald and by Major Bryan Cooper that the Imperial forces could not operate without the assent of the Parliament. This view, however comforting to Irish sentiment, is clearly untenable. Both these authorities apparently forgot the fact that Article 7 (*b*) of the treaty of 1921, which has the force of law in the Free State under its own and under Imperial legislation, assures to the Imperial forces in time of war or strained relations with a foreign Power such harbour and other facilities as the British Government may require for the purpose of coastal defence, which, naturally, is precisely the kind of defence in which, in war time, the Imperial Govern-

ment would be interested. This provision overrides any terms of the Irish Constitution inconsistent with it, but in point of fact there is nothing in that instrument to contradict the treaty. Article 49 merely provides that, save in the case of actual invasion, the Irish Free State shall not be committed to active participation in any war without the assent of Parliament. Active participation merely means the action of Irish troops, and would not cover the grant to the British forces of facilities for anti-submarine defence. In case of risk of war it would be impossible to trust to the action of Parliament in the Free State to take adequate precautionary measures, unless and until that body is less amenable to Republican influence. No foreign Power could be expected to recognise as neutral a State which was under compulsion to grant facilities of this kind to the United Kingdom, and it would be absurd for a State which owed such obligations to appeal to its right to remain neutral.

In the Union the issue was also revived as a result of Dr. D. F. Malan's assertion that neutrality was now a right of the Union, and this opinion gradually came to be accepted by General Hertzog, whose earlier utterances are inconsistent with the view that he at once homologated the doctrine. On March 8, 1928, he had advanced to the position of the right of the Dominions to remain neutral in a British war. Technically he had discovered a new argument in the dictum of the Secretary of State for the Dominions on June 27, 1927, that "every Government of the Empire is, if it so wish, entitled to exercise every function of national and international right". It is clear that, if this dictum had any binding force, it agrees with the position

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adopted by General Hertzog, but a casual expression of the opinion of one Minister cannot alter the Constitution of the Empire or the principles of international law, and the speaker had no intention of announcing any constitutional innovations. Pressed by Sir Thomas Watt, General Hertzog candidly confessed that neutrality had not been discussed at the Conference, which was his reason for raising the issue at last. He also made a most important admission when he recognised that the peculiar mode in which the Dominions appeared in the list of members of the League appended to the Covenant corresponded with a definite fact, namely, the recognition by the other States that the Empire was in a sense a unity, so that the League could never claim that the members should take part in hostilities against one another, even if one part of the Empire were a delinquent against the League Covenant. But he asserted that this did not conclude the question, for it was perfectly legitimate for the League to impose neutrality on parts of the Empire. This conclusion followed from the fact that, before the formation of the League, the Dominions as part of the Empire were perfectly at liberty to remain neutral in a British war; it was, therefore, open for the League to demand neutrality, since that was not incompatible with membership of the Empire.

The contention is clearly without any validity, and rests upon the fact that General Hertzog is unable or unwilling to understand the distinction between the popular and the legal sense of neutrality. It has been long conceded, as has been seen, that a Dominion may remain inactive in a British war, unless itself attacked, but that is not neutrality, and that the Dominions

could remain neutral in the period before the League was formed is an inadmissible idea. The failure of General Hertzog to appreciate the issue was seen in his reply to Sir T. Watt, who put to him point-blank the question whether the British admiral would be required to leave Simonstown if the Union determined to be neutral; he answered, "What has that to do with the right of neutrality?" Yet it is clear that, if the Union were neutral, it would be absolutely bound to apply impartially to the British and any foreign naval force the same rules of treatment, and to forbid either to make use of South African bases for naval operations. Again, it is clear that on the outbreak of the war in 1914 automatically all the British subjects in South Africa became liable to punishment if they traded with the enemy, and ran the risk of incurring the penalties of treason if they rendered aid to the enemy. Is it to be supposed that the Courts of the Union would hold, on the strength of General Hertzog's opinion, that the present position of affairs has changed all that, and that in law the Union could be neutral in a British war?

Since General Hertzog's argument the conclusion of the Pact to Renounce War has in a measure strengthened the case of those who contend that ultimately neutrality will become a recognised possibility for the Dominions. The Pact was not concluded under League auspices, and League understandings have no application to it. What would be the position if the United Kingdom, acting on its reservations as to treating an attack on Egypt or Iraq as a matter of self-defence, should enter into war? Could the Dominions claim that they were bound under the Pact to preserve

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neutrality? If they declared neutrality, could they claim that under the Pact a foreign Power, despite the fact that it was engaged in war with the United Kingdom, was bound not to attack them? The Dominions are not bound by the British reservations, and, therefore, they might legitimately, on one view, hold that, if the British Government went to war to ward off an attack on Egypt, it was really not justified under the Pact, and that they could not assist without themselves violating the Pact. The dubious position indicates how difficult it is to conduct foreign policy successfully if the Dominions are not really at one with the United Kingdom, and, like the Free State and the Union, are rather seeking to minimise than to increase effective co-operation.

The situation as regards Egypt significantly illustrates the difficulties of the present position. If the policy of the United Kingdom can involve the Dominions in war, then it is in theory necessary that they should have power to influence that policy, but at present clearly the real control of British policy continues to rest with the Imperial Government. There is no reason to suppose that any Dominion Government would itself have adopted a different policy in the matter of Egypt than has been followed by the British Government, if the responsibility for action had rested with it, but under the régime now existing the Dominions have the right, which they freely exercise, to regard British policy as a matter with which they have no concern, while they reap the benefits and are exposed to the risks attending it. The position is one incompatible with claims of sovereignty, and the efforts of the Union and of the Free State to claim the

right of neutrality are beyond doubt logical in so far as they recognise that the present position is in principle unsound. But in the case of the Free State the effort is confronted by the fundamental fact that the United Kingdom has insisted on certain securities for her defence in the shape of facilities on Irish territory, and that no foreign State could be expected to respect the neutrality of a territory which was offering the United Kingdom such instrumentalities for the conduct of war. Moreover, the solution of neutrality within the Empire would have little attraction for foreign States, for they would realise that, as a State can terminate at will its position as a neutral, a British Dominion, which really sympathised whole-heartedly in a war with the United Kingdom, might preserve itself from attack by the foreign State by declaring its neutrality, and then at a favourable moment join in the combat. Even if it remained neutral, there would be the constant suspicion that its neutrality was essentially benevolent where the actions of the United Kingdom were concerned.

CHAPTER XXII

IMPERIAL CO-OPERATION IN FOREIGN AFFAIRS

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THE effective co-operation of the Dominions with the United Kingdom in issues of war and foreign policy brought about by the Imperial War Cabinets of 1917 and 1918 and the Empire Peace Conference Delegation could not be continued after the conclusion of peace. The Dominion Prime Ministers had to return to countries whose local affairs had been too long without their personal control, and the domestic problems which they had to face taxed all their strength. Moreover, their Parliaments were busied with the issue of resettlement, and were in no mood to attend to foreign affairs unless they were absolutely compelled to act. In Canada, the lack of support for the peace settlement and for the League of Nations exhibited in the United States helped to strengthen the traditional tendency to keep aloof from foreign politics, and Sir R. Borden's resignation on grounds of health in July 1920 was a serious blow to any attempt to maintain continuous touch with foreign affairs. Mr. Meighen, his successor, soon found himself confronted with the probability of the fall of his Government from power, and Mr. Mackenzie King, when he took over office after the general election of

1921, was mainly busied in re-establishing Liberal policy in domestic issues. A strong revulsion from war manifested itself, helped, of course, by the fact that Quebec had never accepted loyally the duty of sharing in hostilities once compulsion had become necessary. In Australia, Mr. Hughes returned to find that his dictatorial methods had been far from popular with his colleagues, and that his popularity was hopelessly on the wane, so that he had to confine his efforts to domestic issues. New Zealand was content to allow foreign affairs to remain mainly in the hands of the Imperial Government, and General Smuts was compelled by the death of General Botha to face a situation of great domestic difficulty, while his own experience of European politics had disinclined him for any active intervention in European affairs. Indeed, at the Imperial Conference of 1921 his attitude was that of one who counselled disinterestedness on the affairs of a Europe which had ceased to be the most important feature of world politics, and who held that the problems of the Pacific were the world problems of the next fifty years or more. This narrowness of vision was natural enough in one identified with South Africa, but clearly it overlooked the fundamental facts. Germany, he thought, would revive, but not in this generation nor the next; within five years Germany had become a member of the League of Nations, and her position as one of the great Powers of the world was recognised on every hand, and it was obvious to all unprejudiced observers that the only problems of immediate concern to the British Empire had primarily to do with Europe.

In view of this attitude on world affairs, it was

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inevitable that the discussions at the Imperial Conferences of 1921 and 1923 should show a distinct tendency on the part of the Dominion Prime Ministers to seek to revert to the old-fashioned doctrine of isolation and aloofness from foreign entanglements. This was specially so in 1921, when the aim of Canada was to cut the Empire adrift from the Japanese alliance, and it was fortunate that it proved possible with the aid of the United States and of Japan to work out the amicable termination of the alliance by the Washington Conference. It is decidedly difficult to imagine what could have been done, had not this fortunate loophole of escape presented itself. It would have been absurd to continue an alliance between the United Kingdom and Japan without the concurrence of the Dominions, and the Canadian objections, which reflected the prevalent feeling in the United States also, were pressed without much regard either for Japan's claim to gratitude for her aid in the war or the true interests of the British Empire. A general discussion between the Imperial Cabinet and Dominion Ministers on foreign affairs revived memories of the Imperial War Cabinet, but naturally the Dominions contributed nothing positive to the solution of the Empire questions save an agreement on the proportions of reparations to be allocated to the different parts. British policy in Egypt was approved, but without acceptance of any responsibility for it, and the same attitude of aloofness marked the reception of Mr. Hughes' proposal that the whole of the Empire should co-operate in Imperial defence, a proposal absolutely unacceptable to Canada, which already had dismissed all idea of maintaining the military forces of the Dominion on an increased scale,

and was not prepared to revive the old project of an effective, if small, Canadian navy. An acceptable excuse for inaction was found in referring to the discretion of the Dominion Parliaments the measures to be taken for defence after the results of the proposed Conference on Disarmament had been held. The one positive issue which was pressed at the Conference by New Zealand, the unhappy position of the people of the New Hebrides under the inefficient condominium, failed to produce any result. British diplomacy then, as in 1926, was quite unequal to the task of inducing France, as some slight return for the concessions made to her in financial matters, to relinquish her hold on the islands, despite the admitted fact that under the present system of government nothing effective can be carried out.

Not until 1923 was there a further discussion of foreign affairs of a comprehensive kind between the Dominions and the United Kingdom, as general elections in Australia and New Zealand in 1922 forbade the holding of an Imperial Conference in the preceding year. Again there was the usual accord as to British policy in Egypt, and the peace arrangements as to Turkey were in principle agreed upon, though the attitude of Canada was to show that this agreement was purely platonic and formal and involved no responsibility on the part of the Dominion. The Dominion representatives concurred also in the British policy in the matter of reparations and opposed any dismemberment of Germany, as a protest against a line of policy widely attributed by contemporary public opinion to France owing to her attitude towards the separation movement in the Rhineland. The Dominions

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were even prepared to advise the British Government to call a conference if the American proposals for the reconsideration of the issue of reparations failed to meet with acceptance. But, while the Dominions were ready to give general approval, without responsibility, they eschewed carefully any expression of their attitude on the issue of the British policy in regard to Palestine, doubtless on the ground that they were not prepared to discuss with the British Government their own treatment of mandated territories. The Dominions' attitude of readiness to advise so long as no responsibility resulted was repeated in the attitude adopted to issues of defence. They were prepared to approve the maintenance by the United Kingdom of a Home Defence Air Force sufficiently strong to ward off attack from France, and to urge on the United Kingdom the maintenance of a fleet on a parity with that of the United States in order to afford safety to the trade routes in the Mediterranean and the Red Sea. They approved the construction in the interests of Australia, New Zealand, and India of the Singapore base, but they carefully refrained from any recommendation to the Dominions themselves beyond affirming that they had the primary responsibility for their local defence, and that what they should do was for their Parliaments to decide. It is clear that this attitude definitely meant admission that the control of foreign policy in general must remain with the Imperial Government, since the United Kingdom alone was prepared to maintain forces to carry out the needs of Imperial defence.

This condition of affairs obviously presented some disadvantages as well as advantages, and it was partly

on account of foreign issues as well as in respect of domestic issues, such as the policy of preference, that the British Labour Government decided on June 23, 1924, to raise the question of the mode in which there could be more effective consultation between the parts of the Empire on matters of general foreign policy and general Imperial interest. It was pointed out that the principle of the necessity of effective arrangements for continuous consultation in all important matters of common Imperial concern, and of such necessary concerted action founded on consultation as the several Governments might determine, had been formally recognised by the Imperial Conference of 1917. It was admitted, of course, that the action to be taken as the result of consultation must be subject to the constitutional requirements of each country, but experience had shown that the system had two serious defects. In the first place, immediate action was rendered extremely difficult, especially between Conferences, even on occasions when such action was imperatively needed, as in foreign affairs. Secondly, in issues which were the subjects of political controversy decisions were apt to be upset by a change of Government. The remedies for this state of affairs were admitted to be doubtful. It might be possible to reconsider the resolutions as to treaty negotiations which had been discussed at the Imperial Conference of 1923, and to facilitate thus rapid decision on foreign issues. But the second difficulty presented harder problems, and it could only be tentatively suggested that at Imperial Conferences oppositions as well as Governments might be represented, or the views of Parliaments be ascertained in advance, so

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that decisions could be taken with assurance of homologation.

It is clear that the proposals of the Government were not well thought out. Its own action in recognising the Russian Government *de iure* without Dominion approval and its reparation action were examples of the difficulties as to rapid decisions being taken without risk of offending Dominion susceptibilities, while the attitude of Canada as to the ratification of the Lausanne Treaty proved that no amount of general approval would be sufficient warrant for expecting the assent of a Dominion to accept responsibility for a treaty. But there was clearly no real hope of remedying these defects, and still less was it likely that any Dominion Government would approve the idea of the representation of oppositions. The Government of Canada quite firmly proved that the proposal was illegitimate, as an effort to substitute for the unfettered discretion of Parliament a controlling authority in the shape of the resolutions of the Imperial Conference constituted with opposition representation. It is true that this theoretic objection can be regarded as rather far-fetched. If there was ever a Conference decision in which all parties agreed, it was most improbable that any Parliament would wish to depart from it, but obviously the whole idea was impracticable.

The views of the Commonwealth Government were much more common-sense than those of the British Government. It was pointed out that matters of policy were properly and regularly decided by the Imperial Conferences, followed up by the approval of that policy by the Parliaments, and no other method could

well be devised. Urgent matters emerging in the field of foreign policy must be dealt with on the basis of consultation, but steps could be taken to improve the closeness of contact which rendered such consultation easy and effective. The Foreign Office should keep the Dominions more fully informed, by telegram and dispatch, of the movements of foreign politics. Greater efforts should be made to anticipate questions which were likely to arise and to demand swift solution, with a view to ascertain the views of the Dominions in advance, in lieu of confronting them with a position in which it was too late to offer alternative modes of procedure. As a means to secure these ends, the creation in the office of the High Commissioner in London of a branch in touch with the Foreign Office was suggested; the Prime Minister would thus have a representative in London who would keep him informed of current events and atmosphere in relation to foreign affairs. The idea of representation of oppositions was deprecated also by the Government of Newfoundland, and Australia and South Africa were not even willing to accept the suggestion of discussion of the issues at a preliminary conference, although the other Dominions consented to this course. Ultimately the fall of the Labour Government resulted in the abandonment of the suggested conference by the Imperial Government, which, instead, suggested that a special conference should meet to deal with the vital issue of the Geneva Protocol for the Pacific Settlement of International Disputes. In this case, however, despite the earnest desire of the Imperial Government for personal discussions, it proved impracticable thus to deal with the matter, and the question was disposed

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of by correspondence, the Dominions displaying a complete unwillingness to accept the Protocol, which in Australia and New Zealand alike was specially disliked, because it seemed to open up the possibility of interference in the domestic issue of immigration.

The issue of improved consultation arose again at the Imperial Conference of 1926, and resulted in agreement on a very vague resolution. The Governments recognised the desirability of establishing and developing a system of personal contact both in London and in the Dominion capitals to supplement the present system of intercommunication and the reciprocal supply of information on affairs requiring joint consideration. The manner in which any new system was to be worked out was relegated for settlement to the Governments concerned, on the distinct understanding that any new arrangement would be supplementary to, and not in replacement of, the system of direct communications between Government and Government and the special arrangements in force since 1918 for communications between Prime Ministers. Under these existing arrangements, not only do the departments of External Affairs in the Dominions communicate direct with the Dominions Office, but the Prime Ministers have the right, which they use on issues of first-class importance, to telegraph to one another direct.

The efforts to extend personal consultation were hardly in the first instance imposing. The earliest was that of Australia, where Mr. Bruce from 1924 stationed an officer in the High Commissioner's office[1] in order to keep him in personal touch with the Foreign Office,

[1] New Zealand acted likewise, in 1928.

while a visit by a Foreign Office official to the Commonwealth facilitated this proposal for a personal note in relations between the Prime Minister's Office and that department. In 1928 a more odd and irregular plan was admitted, under which a Foreign Office official was attached to the department of the Prime Minister of New Zealand in a consultative or informative capacity, especially in relation to foreign affairs, but without administrative or executive functions. It was expressly stated that he was in no sense a representative of the British Government, though he was to be paid from the funds of the Dominions Office in a manner suggestive of careless finance. In the Union nothing of this sort was done, but the position there was anomalous. It is true that from July 1, 1927, the Governor-General ceased to act as the channel of communication on any issues between the British and the Dominion Governments, but he remained High Commissioner for South Africa, having charge in that capacity of the Protectorates of Swaziland and Bechuanaland and of Basutoland, and by the desire of the Union Government he continued to serve in two capacities, being under direct Imperial control in his capacity as High Commissioner. Accordingly, by a rather absurd arrangement, the Secretary to the High Commissioner was treated as a possible intermediary between the British and the Dominion Governments in matters which could not be handled merely by direct communications between the Governments, and was in March 1929 formally recognised as a representative of the British Government.

In addition to these rather informal modes of keeping in touch, there remained open recourse to the

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services of the High Commissioners in London. The proposal made by Sir Joseph Ward in 1911 that the High Commissioners should serve as the regular channels of communication between the Governments was then unacceptable, but the use of the High Commissioners for political as well as for commercial business had steadily developed. The Ministers naturally desired from time to time to reinforce their dispatches and telegrams by personal contact, and the High Commissioners came more and more often to be summoned to conversations with the Secretary of State in order to keep them *au fait* with the progress of events and to enable them to send confidential information and suggestions to their Governments. The proposal of the British Government in 1912 that the Dominions might station resident Ministers in London,[1] in order to maintain touch with the British Cabinet, never matured precisely in that form, for the Dominion Governments were all afraid lest any Minister of the Dominion Cabinet, who was thus frequently stationed in London, would incline to accept British views of policy and to commit his Government rashly to accepting the line of action which appealed to the British Government. Nevertheless, the system was in a sense operative for Canada after the death of Lord Strathcona in 1914, for both Sir George Perley and Sir E. Kemp, who represented Canada, especially for military purposes, in London, were Ministers, and not merely civil servants, but the Liberal administration resumed the older practice of having as High Commissioner a man of business capacity rather than political experience and did not

[1] For Sir R. Borden's approval of the idea on August 17, 1925, see *Canadian Bar Review*, iii. 518.

include him in the Cabinet. Australia and New Zealand adhered to the custom of appointments of distinguished politicians to hold the office of High Commissioner on the usual non-political tenure, and the same procedure was followed in the case of South Africa and the Irish Free State. But the fact that these officers were not Ministers, though it diminished their authority *vis-à-vis* the British Government, rendered them admirably suited to play the part desired by the Dominion Governments—that of the accurate and faithful transmission of opinions between London and the Dominions. It was, of course, a natural outcome of the tendency in certain quarters in the Dominions to seek to assimilate the status of the Dominions to that of independent States, that the suggestion should be made that the High Commissioners should be transformed into diplomats proper, and that their relations to the British Government should be placed on a similar footing to that of emissaries of foreign States. There is, of course, a precedent for such action which might be adduced to support it as not in any degree incompatible with the unity of the Empire. The several states of the German Reich are represented in one another by diplomatists, though the States have a mere scintilla of international personality as a relic from the past when they enjoyed a greater measure of independence under the Imperial constitution. The proposal, however, has not been welcomed either in the United Kingdom or in the Dominions, having been deprecated by the Secretary of State for the Dominions as well as by Mr. Mackenzie King. There is, it must be admitted, one point of disadvantage in the present régime: the High Commissioners, despite the import-

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ance of their functions, not being diplomats, are not entitled to the immunity from the jurisdiction of the British courts[1] which extends by international law to diplomats, a fact which may be noted as one of the many proofs that in law the Dominions remain parts of the Empire and have not become independent States.

There was considerable delay before the British Government made up its mind to appoint a High Commissioner to Ottawa to represent its views to the Dominion Government in the same way that that Government represented its views through its High Commissioner in London. The choice of Sir William Clark for the office indicated, having regard to his work in the past, that one important part of his functions would be commercial and would consist in affording assistance to the efforts of the Trade Commissioner[2] in promoting British trade with the Dominion. Mr. Mackenzie King welcomed the appointment on May 28, 1928, on the score that personal discussions would help to avoid misunderstandings and further co-operation, while Mr. Bennett insisted that in the long run issues must be disposed of by correspondence, since the written word must control the spoken word. It was made clear that there was no idea of treating the appointment of Sir W. Clark as a diplomatic one; his status would be precisely similar to that of the Canadian High Commissioner in London. Nor is there any

[1] Keith, *Journal of Comparative Legislation*, 1925, pp. 201, 202. Immunity for High Commissioners in the Dominions and the United Kingdom should be legislated for.

[2] A Trade Commissioner was decided on for Dublin in March 1929. The Free State would like diplomatic representation in Canada: Mr. Fitzgerald, November 21, 1928.

reason to suppose that the appointment will not serve useful purposes, apart altogether from the satisfaction which it gives to those who hold that on the ground of equality of status it was right that the Dominion should be treated by the United Kingdom in the same way as it treated that Power.

It has been objected that the system of High Commissioners is of an unsatisfactory character when regarded as a means of keeping the Governments in touch on foreign issues. The High Commissionership for Canada has been described[1] not unjustly as "an effort to combine the functions of a commercial consul with those of a general publicity agent, to these being added an occasional and irregular intervention in affairs of State". The correspondence between the Dominion and Imperial Governments does not pass through his hands as a normal rule, and he has no general instructions to present the views of the Dominion Government to the Secretary of State. The same observations apply to the other High Commissioners, and it is equally true of them all that the appointments are matters of political patronage, and that no steps are—or at present can be—taken to secure that the official appointed has diplomatic qualifications or experience in the conduct of international affairs. Clearly there can be no question of such an official serving the effective purposes of such an Ambassador as Mr. Page during the critical period of the neutrality of the United States in 1914–17. It is indeed more probable that this function of establishing effective personal contact between the Dominion and Imperial Governments will fall rather to the British High Com-

[1] Corbett and Smith, *Canada and World Politics*, p. 177.

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missioner in the United States. He will always be a trained official, fully capable of expressing the view of the Imperial Government, and from his professional training and position enjoying the full confidence which a Dominion Government often finds it difficult to repose in a High Commissioner who may be an old political rival or enemy.

It may also be admitted that the Dominion Governments, even including Canada, have as yet not equipped themselves with staffs in any way equal to the burden of mastering foreign affairs, even if the Ministers had time to spare for this arduous business. As it is, the information supplied from the Dominions Office, which acts as a post-office for the Foreign Office, is far in excess of the capacity of the Dominion Ministries of External Affairs to cope with, and it is not in the least surprising that the Dominion Governments, with their constant pressure of domestic issues, should have no time or inclination to consider any aspects of foreign questions save those which directly and deeply concern the Dominion. The days have disappeared when general foreign issues were never communicated to the Dominions, but the time has not yet arrived when the Dominions have either the inclination or the capacity to deal with foreign policy as a whole. Ministers themselves, fully aware that they cannot spare time to master foreign issues, recognise that their Parliaments know far less than they themselves do, and have not the least wish to turn their minds away from local questions to the contemplation of problems in the world outside, if these issues have no immediate bearing on Dominion problems.

The mere fact that the Prime Minister in the Do-

minions, other than the Irish Free State, is essentially the only member of the Dominion Cabinet who concerns himself with foreign affairs, explains sufficiently the inability of Dominion Governments to keep *au courant* with these matters, for a Dominion Prime Minister is at least as hard-worked as the Prime Minister of the United Kingdom; if the interests he handles are less complex, he lacks the same amount of skilled aid. To this state of lack of time to deal with foreign questions is due in considerable measure the obvious tendency of the Dominions to remain in isolation from the current of British foreign policy. Ministers who realise that they cannot seriously attempt to control the progress of events are reluctant to accept any form of responsibility with regard to them. In these conditions they may either cheerfully acquiesce in, and commend, British policy, or they may ostentatiously wash their hands of it, and insist that the Dominions must maintain complete freedom in the matter. In regard to British policy in Egypt we have excellent examples of the possible attitudes. Australia and New Zealand, it is clear, had no exception to take, and fully concurred in what the British Government thought would secure the safety of the Suez Canal. Mr. Mackenzie King, on the other hand, was not prepared to commit his Government even in the slightest degree. The proposed treaty of alliance implied the possibility of action in defence of Egypt. The safety of the Suez Canal was not an issue of immediate concern to Canada; Canada, therefore, must remain free to decide on action, if it should ever become necessary, without the feeling that she had committed herself in principle by approving in advance of the British policy.

The matter, of course, becomes far more serious when the Dominions refrain from joining in so important a pact as that of Locarno. There has undoubtedly been a tendency in Europe, as well as in the Dominions, to regard this fact as indicating an incipient decline in the effective unity of the Empire. There are also certain aspects of the matter which have not been explained. Mr. Coates for New Zealand on November 18, 1925, definitely approved the scheme and promised to move Parliament to approve of the acceptance by the Dominion of the responsibilities of the treaty, but on July 28, 1926, he announced delay, and after his return from the Imperial Conference, at which the Imperial Government was congratulated on its achievement, he dropped any proposal of ratification. Mr. Bruce's attitude is equally inexplicable; he seems to have admired the pact sincerely, but in the Commonwealth Parliament interest centred in the desire to obtain Germany alone a permanent seat on the League Council, and there reigned a discreet silence regarding the undertaking of responsibility for the pact. In Canada, at least, Mr. Lapointe vouchsafed the observation that the Dominion might have obligations under the League Covenant, but it was not going to pledge itself to the definite obligation of the pact. Apparently, whatever may have been Mr. Mackenzie King's feelings in London, the attitude of the Government was determined in a negative sense by Mr. Bourassa's attack on the Prime Minister for his action in committing Canada at the Imperial Conference to approval of the pact. Undoubtedly his criticism in this regard had value, for nothing can obliterate the fact that the Imperial Government did receive unqualified approval for its

policy, and British opinion would naturally resent a refusal of the Dominions to implement that approval if the need for action should ever arise. The attitude of the Irish Free State is equally unsatisfactory; it is clear that it homologated the Conference resolution, but when attacked by Mr. Johnson, leader of the Labour party in the Dail, the Minister for External Affairs hastily declared that the Irish Free State took no responsibility for the treaty. It was not to be expected that General Hertzog would do anything, as he and General Smuts had before the Imperial Conference committed themselves to disapproval.

It seems clear from these facts that the attacks which have been made, as by General Smuts, on the British policy in respect of Locarno cannot be substantiated, and that, however unfortunate it is that there should have been the failure of the Dominions to take part in the responsibilities created by that treaty, the blame does not rest on the Imperial Government. The affairs of the world must be conducted, and the United Kingdom, as a great Power in her own right apart from the Dominions, cannot adopt the attitude of selfish isolation which would be implied if she had failed to intervene with the guarantee which made Locarno possible, and so opened up a prospect of abiding peace in Europe. That the Dominions should have failed to act is merely a proof of the lack of imagination of their statesmen and of experience and knowledge in their people. It implies no censure on British management, and, on the other hand, it is impossible not to understand the difficulties of Dominion Prime Ministers, who know that the rank and file of their own supporters will not be enthusiastic

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over an Imperial issue, while the oppositions will rake up the old hatred of war, and of anything implying obligations to go back to the dangers of hostilities.

It remains pure matter of speculation how far the co-operation of the parts of the Empire can be maintained or made more effective, or whether it will be reduced or disappear. The motives which make for separation of the Dominions from the United Kingdom are certainly not, on the face of them, at all strong or likely to prove effective, while the objections are manifold. For Australia and New Zealand there is the dominant fact of defence; it is incredible that either Dominion or the two together could enjoy safety if divorced from the British Empire; prudence forbids them to cherish any belief in security to be obtained from the United States, but if it were to be had, it is clear that the price to be paid would be a measure of dependence on that power far greater than the authority now vested in the United Kingdom. The Union of South Africa has frankly and unashamedly declined to prepare for her own naval defence, and the whole of her trade depends for its protection on the British fleet.[1] Canada is secure, indeed, in the Monroe Doctrine, but, on the other hand, her position *vis-à-vis* the United States would be one of complete inferiority if it were not for her connexion with the British Empire. As matters stand she enjoys by virtue of that connexion a measure of consideration which could not be hers if she were merely another American Republic with a population infinitely smaller than that of her southern neighbour, and racially divided; nor is there any doubt

[1] "The great sheet-anchor of South Africa's liberty is the British fleet": General Smuts, *The Round Table*, xviii. 647.

that the French Canadians, despite the autonomist views of Mr. Lapointe, see in the British connexion an invaluable support for their privileges as regards language, education, nationality, and creed. That the Irish Free State should welcome separation is the reasonable conclusion to be derived from its general attitude; but, on the other hand, it has learned to appreciate the advantages of effective naval defence conducted without cost, and of connexion for international purposes with a great Empire.

If separation, then, is improbable, still co-operation in foreign affairs might be diminished. For instance, the Dominions might really seek what has been ascribed to them by some publicists, mere personal union with the United Kingdom. The answer to this is probably that, even if the Dominions desired it, experience would show that there is really no possibility of a half-way house between separation and some real unity. Whenever there was a real conflict between the Crown in two capacities, the British people would decline to consent that the King should in his Dominion capacity be opposed to himself in his Imperial capacity, and the union would terminate; indeed it is obvious that the Sovereign himself would be the first to decline to accept a position in which his loyalty to his people would not be single and indivisible. The days of democracy forbid entirely a recurrence of the form of Union of Scotland and England or of the United Kingdom and Hanover.

On the other hand, there are reasons to hope that, with the slow development of consciousness of foreign issues in the Dominions, there may grow up a more willing co-operation between the United Kingdom

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and the Dominions. If the Dominions did not undertake responsibility for Locarno, at least they expressed their cordial approval of it. So again at the League Assembly of 1925 a British representative was incautious enough to say that in regard to the question of signing the obligation for compulsory reference of issues to the judgment of the Permanent Court there must be united action by the Empire: "In a matter which affected either the vital interests, independence or honour of any one of the six nations, there must of necessity be unity of action." The Irish representative then sharply challenged this innocent dictum, and asserted that Ireland alone could express the views which she held on any issue, and that the British representative had no power to speak for her. None the less, at the Imperial Conference the Irish Free State bound herself not to accept the compulsory clause, unless and until the matter had been discussed with the other parts of the Empire. Moreover, the essence of that Conference in regard to foreign affairs was the repetition of the idea that no part must act without consulting the others, no part must place active obligation on the others, and all must as far as possible co-operate.

Doubtless, if there is to be effective co-operation, much will have to be carried out both in form and in substance. Substantial improvements in the methods of the Dominions for dealing with foreign issues will have to be devised, and the Parliaments of the Dominions must be induced to take up the study of foreign affairs at least to the extent which is followed in the United Kingdom. Moreover, Imperial policy must unquestionably be framed with a constant desire

to avoid needless implication in European issues which the Dominions regard with distrust. In the major European questions the Dominions for their part must learn to take an intelligent part, but they have a right to expect the United Kingdom to remember their disinclination to be engaged further than is requisite in the affairs of Europe. But the determination of Canada to take a seat on the Council necessarily has brought the Dominion into closer contact with the realities of foreign politics, and this experience, which may be expected to be shared by the other Dominions in course of time, ought to result in a greater comprehension of the real facts of world relations. The probability that foreign politics will largely be influenced by the League minimises the risks of violent disputes between parts of the Empire. General Hertzog himself, when asserting his conversion to the doctrine of the right of the Dominions to remain neutral in a British war, candidly confessed that the occasion for such neutrality would only "arise in the very improbable case of Great Britain or the Dominion at war being declared the aggressor by the Council of the League. We have a right to presume that this will never occur." In these circumstances one may doubt whether a crisis is probable, when a Dominion would really wish to cut herself adrift from the rest of the Empire. For Australia or New Zealand to adopt such a course would be suicidal; probably the same remark applies to the Union of South Africa, and there is no possibility of the United Kingdom ceasing to demand from the Free State, even if its republican status were conceded, certain facilities for defence, the concession of which is inconsistent with true neutrality. The

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negotiations with Egypt in 1927–8 proved that, where vital interests are concerned, the British Government will not be swayed by considerations of respect for the sovereignty legitimately enough claimed by other peoples.

Moreover, stress must be laid on the remarkable readiness displayed by the United Kingdom in remoulding its foreign policy to accord with Dominion aspirations. The sacrifice of the Japanese Alliance in 1921 was far from attractive to British politicians, who were deeply conscious of the valued security which it had afforded for so many years, and of the fact that Japan had been scrupulous never to take advantage of it, while the aid given by her navy at the outbreak of war had been an invaluable protection for the Australasian contingents setting out for Europe. The concessions then made to the desires of Canada have sometimes bred resentment in New Zealand and even Australia, where Mr. Hughes and Mr. Bruce have never failed to voice the feeling that Canada shows a deplorable disregard for its elementary duty of contributing proportionately to the defence of the Empire. Without stressing unduly this aspect of affairs, it is clear that no country has ever been able to influence foreign policy so greatly as has Canada at a more infinitesimal cost. But in the United Kingdom, as opposed to Australasia, there has never been the slightest disposition to rule out the value of the views of the Dominion, merely because it is not prepared to back them by men or money in time of peace and reserves unfettered discretion as to its attitude in war. There exists instead a reasoned confidence that in a just cause Canada, despite the ingrained pacificism of

its French inhabitants, will not be found lacking in the performance of duty.

Moreover, the interdependence of countries under the régime of the League renders the pleasures of isolated sovereignty almost negligible; the Dominion can see at Geneva how little effect is produced by the lesser sovereign Powers, and how much more convenient it is to be associated with a great Power. Even in the exercise of the separate treaty power so fully conceded at the Conference of 1926, subject only to a final Imperial control, the Dominions have not found that they can obtain more than was the case when the British Government actively participated in the negotiations. There is some justice in the criticism[1] made of the last agreement with Mozambique: "The first result of 'sovereign independence' would thus seem to be a diplomatic victory for a foreign Government at the expense of several of the industries of the Union", and the treaty with Germany as to trade bears proof that the inexpert negotiators of the Union were no match for German diplomatic skill and experience. While the régime of separate treaty-making will, of course, continue, it is by no means certain that it will tend in any degree to weaken the fabric of Imperial Unity, while the system gratifies national feeling in the Dominions.

There is, further, a most important practical consideration which makes for the maintenance of Imperial unity — the advantages derived by Dominion citizens from their being at the same time British subjects. No Dominion within any time that matters could possibly provide for the safety and protection

[1] *The Round Table*, xviii. 886.

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of its citizens anything comparable with the British diplomatic and consular services, whose resources are fully and freely at the disposal of the Dominions. Further, the British Government, in its treaties with foreign Powers, still secures for every British subject rights of the most important kind, including permission to immigrate, to settle, to carry on business, professions and trades, and to be exempt from military and political imposts. If the Dominions seceded, even if they became united in a mere personal union with the United Kingdom, then there can be no doubt that these privileges would be lost. It is true that in the technical sense their citizens might under a personal union remain British subjects, but there is not the slightest reason to believe that in such a case any foreign Power would concede that their character as technically such in municipal law[1] could be applied to the interpretation of the term "British subjects" in international treaties.

There are, accordingly, sufficiently important practical grounds for the maintenance of the unity of the Empire, even apart from the fact that the United Kingdom cheerfully undertakes final responsibility for Imperial defence at far greater cost per head[2] than that borne by the individually much more wealthy population of the Dominions. Perhaps more important reasons are the considerations which have nothing to do with immediate advantage—those common

[1] *Isaacson* v. *Durant* (1886), 17 Q.B.D. 54.

[2] Total naval estimates, 1927–8, United Kingdom, £58,000,000 (25s. 6d. per head); Canada, $1,725,000 (0·19); Commonwealth of Australia, £5,736,000 (18s. 5d.); New Zealand, £667,324 (9s. 4d.); Union of South Africa, £125,479 (1s. 6d. European population); Irish Free State, *nil*.

traditions of the past and hopes of the future, and those resemblances in origin, in laws, and in manners, in what inwardly binds men and communities of men together, to which Mr. Gladstone appealed when, in 1846, he deprecated the idea that Canadian loyalty was dependent on the assurance of commercial favours from the United Kingdom.

It is true that the creation for the Dominions of opportunities of diplomatic activity does open up the way to a gradual severance of the bonds of Empire, and to the creation of a state of affairs in which the Dominions and the United Kingdom, even if nominally under one Crown, would virtually be foreign States. But it is equally true that such a consummation is not in the least necessary. The British Government has always shown the utmost readiness to admit the principle that every British subject should be equally eligible for all posts under the Crown. Not only has the Imperial Civil Service been open to all British subjects, but the same rule has applied to the India Civil Service, and special care has been taken to encourage graduates of the Canadian Universities to enter the Colonial Civil Service. It would be entirely in keeping with the attitude of the British Government if efforts were made to link the diplomatic services of the United Kingdom and the Dominions into an effective whole by the principle of freely lending the services of British diplomats to the Dominions and *vice versâ*. The system is applied on a large scale in the case of the British and the Dominion naval forces, and in some degree as regards military and air services. No Government thus would part with control over its diplomatic agents, but each Government would profit

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by the fact that it had men under it who had a wider knowledge and outlook than could be obtained by mere service under a single Government. No one would deny that the British and Dominion naval forces are infinitely more likely to be effective, if war should arise, under the present system of interchange of officers and attachment for purposes of training than they could be if each Dominion fleet were left to develop in isolation, and there seems nothing to prevent equally profitable interchanges and attachments in the diplomatic services and the Foreign Offices or Departments of External Affairs of the United Kingdom and the Dominions. If there is any truth in the Dominion view that the attitude of the Foreign Office is too much dictated by European considerations, and that the real problems of the day are those of the Pacific,[1] the presence of Dominion representatives on the staff from time to time might correct the error, while they in their turn might gain an insight into the affairs of Europe which would be enlightening to their Governments. This would make for a constant and cordial co-operation between the legations of the Empire and the Dominions in foreign countries, and prepare the way for the time when there will be general assent in the Dominions to the idea that in the absence of the British Ambassador to a foreign court, his place will naturally be filled for the time by the senior Dominion Minister accredited. It was a perfectly sound instinct which caused Sir R. Borden and the British Government in 1920 to agree to this principle, though doubtless the idea was then premature, and it may well be, despite appearances to the contrary at the present day,

[1] *The Round Table*, xvii. 656-8, xviii. 395-403.

that the ultimate and most essential unity of the Empire will be found in the carrying out in concert of a foreign policy based on the fundamental principles of the League of Nations, which ought to find its most effective and disinterested supporter in the nations of the British Empire.

Moreover, the Dominions share with the United Kingdom one common interest of the highest moment—the maintenance of the freedom of the seas on the one hand, and the preservation, so long as international security has not been achieved, of the right by the use of naval force, as in the war of 1914–18, to exert economic pressure on a State which attacks the Empire in any of its parts. For the accomplishment of these two objects the essential condition is effective accord between the Empire and the United States, and the Dominions with their essentially pacific purposes should be able to co-operate effectively in devising some scheme by which the world may be assured that the two great naval Powers shall unite to assure the utmost freedom of the use of the seas for all Powers which obey in spirit as well as in letter the doctrines of the Pact to Renounce War.

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